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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No: 961

THE AMERICAN TOBACCO COMPANY,
Petitioner,

—v.—

MARY GREEN,
Respondent.

THE AMERICAN TOBACCO COMPANY,
Petitioner,

—v.—

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD R. NEAHER
25 Broadway
New York 4, New York
Counsel for Petitioner

JANET C. BROWN
EDWARD C. McLEAN, JR.
CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 Broadway
New York 4, New York
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cases on December 11, 1963.

Citation to Opinions Below

The opinion of the Court of Appeals dated December 11, 1963, printed in Appendix A hereto, *infra*, p. 1a, is reported at 325 F. 2d 673. Other opinions involving the same cases are reported at 304 F. 2d 70 and 85 and 154 So. 2d 169, printed respectively in Appendices C, D and E hereto, *infra*, pp. 21a, 53a and 56a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1963 and is printed in Appendix B hereto, *infra*, p. 19a. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. When a Court of Appeals vacates a jury's general verdict of no liability for error in the charge, are that jury's answers to interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure accompanying that verdict binding on the parties on the new jury trial of the liability issue?

2. When a Court of Appeals vacates a jury's general verdict of no liability for error in the charge and remands for a new jury trial, does the Seventh Amendment permit it to divide between the two juries the determination of the issue of a defendant's liability, by holding the parties bound on the retrial by the first jury's answers to interrogatories on certain factual matters and limiting the second jury to a consideration of other related factual matters in re-deciding the liability issue?

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Federal Rule of Civil Procedure Involved

Rule 49(b) of the Federal Rules of Civil Procedure provides:

"(b) **General Verdict Accompanied by Answer to Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one

or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

Statement of the Case

Summary Statement

Edwin M. Green began this personal injury action against The American Tobacco Company in December, 1957, claiming he incurred lung cancer as a result of smoking defendant's[*] product, Lucky Strike cigarettes. Mr. Green died on February 25, 1958, whereupon his son and administrator, Edwin Green, Jr., was substituted as plaintiff under the Florida Survival Statute (§45.11, F. S. 1959) and his widow, Mary Green, filed suit under the Florida Wrongful Death Statute (§§768.01, 768.02, F. S. 1959). These actions, seeking damages of $1,750,000, were all originally filed by plaintiffs in the United States District Court for the Southern District of Florida, Miami Division, based upon diversity of citizenship jurisdiction.

The survival and wrongful death suits were consolidated and presented for trial in July 1960 upon the plaintiffs' combined "First Amended" complaint and the defendant's answer thereto as amended (R. I, 2-18, 18-24). Plaintiffs alleged six theories of liability common to both claims in separate counts: (1) breach of implied warranty; (2) breach of express warranty; (3) negligence; (4) fraudulent misrepresentation; (5) battery; and (6) violation of Florida and Federal Food, Drug and Cosmetic Acts and the Federal Trade Commission Act.

At the conclusion of plaintiffs' evidence, in a ruling never subsequently questioned, the court directed a verdict for

[*] Petitioner was defendant below and is sometimes hereinafter referred to as "defendant".

defendant on all counts except breach of implied warranty and negligence (R. 639-42), which were submitted to the jury (R. 1105-6, 1124). The jury returned general verdicts for the defendant in both cases and judgment was entered for defendant in each case on those verdicts (R. 1141-2).

After plaintiffs' post-trial motions were denied, they appealed to the United States Court of Appeals for the Fifth Circuit (R. 1157-60). Their appeals, when briefed and argued, were confined basically to contentions that the trial court had erred in instructing the jury regarding defendant's liability on implied warranty under Florida law and that judgments should be entered for plaintiffs on that issue on the basis of the jury's answers to written interrogatories (R. 1162-3)—despite the consistency of those answers with the general verdicts for defendant.

The Court of Appeals first affirmed the judgments for defendant (304 F. 2d 79 [1962]; App. C, *infra*, p. 21a), then reversed them and ordered a new trial (325 F. 2d 673 [1963]; App. A, *infra*, p. 4a; App. B, *infra*, p. 19a), each time by a divided court. The reversal followed an advisory opinion from the Supreme Court of Florida (154 So. 2d 169 [1963]; App. E, *infra*, p. 56a) on a question of Florida implied warranty law which the Court of Appeals had certified to that court although remaining "of the same views as expressed in their opinions on original hearing" (304 F. 2d at p. 86; App. D, *infra*, p. 55a).

The Ruling Sought to Be Reviewed

In reversing and remanding the case for a new trial, the Court of Appeals acknowledged that "[t]he only theory of liability remaining in the case is that of implied warranty" (App. A, *infra*, p. 4a). But in an unprecedented ruling it undertook to limit the new jury's consideration of that issue, as follows (App. A, *infra*, pp. 9a-10a):

"Further, while the general verdicts for the defendant are vacated, the parties are nonetheless bound by the jury's answers to the written interrogatories. The answer to (1), (2) and (3) (304 F. 2d 71, 72) will be directly pertinent upon another trial. The parties may not re-litigate the issues thus already decided under the guise of presenting evidence on the issue of reasonableness, that is, as to whether the cigarettes were *reasonably* fit and wholesome. The evidence to be adduced on that issue must assume as already conclusively established the issues decided by interrogatories (1), (2) and (3)." [Emphasis the court's.]*

In so ruling, we respectfully submit that the Court of Appeals not only gave a jury's answers to interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure an adjudicative effect not intended by that Rule, but also denied petitioner its right to a fair new trial under the Seventh Amendment to the United States Constitution.

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* The court's reference is to four interrogatories which the trial judge formulated and submitted to the jury pursuant to Rule 49(b) of the Federal Rules of Civil Procedure, "seeking to find from you your opinion on certain factual matters that have occurred in this trial" (R. 1124). These interrogatories and the jury's answers were as follows (R. 1139-40):

1. Did the decedent Green have primary cancer in his left lung? Yes.
2. Was the cancer in his left lung the cause or one of the causes of his death? Yes.
3. Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung? Yes.
4. Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green, would be endangered by the inhalation of the main stream smoke from Lucky Strike cigarettes of contracting cancer of the lung? No.

contrary to this Court's decision in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931).

Since no new trial has as yet been had, and the ruling in question is clearly fundamental to the further conduct of this case, petitioner believes that special and important reasons exist which call for the exercise of this Court's discretion to review the judgment now. Certainly the ruling is one of potentially wide application in view of the increasing use of Rule 49(b) interrogatories and one which poses a serious problem if the constitutional right to a jury trial is not to be jeopardized by indiscriminate use of the Rule.*

To demonstrate how substantially the ruling below departs from the accepted and usual course of judicial proceedings in this Court and in other Courts of Appeal, a brief exposition is necessary concerning the implied warranty claim plaintiffs alleged and the factual matters inextricably involved in any jury determination of the merits of that claim, the context in which the Rule 49(b) interrogatories were submitted and answered by the former jury, and the injustice manifestly bound to result from dividing decision of the issue of defendant's liability between two juries.

The Indivisible Liability Issue to Be Retried

Plaintiffs' implied warranty claim, now ordered retried, alleged in substance that defendant, "possessed of superior

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* Two Associates Justices of this Court, in urging repeal of Rule 49, have observed:

"A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury." *Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments*, 31 F. R. D. at pages 618-619 (1963).

knowledge concerning the nature and the manufacture of Lucky Strike cigarettes", thereby "impliedly warranted [they] were fit and safe for human consumption"; that Edwin Green "had no knowledge of or ordinary means to determine" their fitness and "relied" on the warranty in smoking them; that the cigarettes contained "numerous substances which were harmful to the human body" when "used for the purpose and in the manner intended"; that as a result of the foregoing, Green either contracted lung cancer or a pre-existing dormant cancer was activated, which caused his death (R. 4-5).

At the trial of this claim, in addition to requesting general verdicts from the jury, the trial court formulated and submitted four written interrogatories pursuant to Rule 49(b) of the Federal Rules of Civil Procedure, "seeking to find from you your opinion on certain factual matters that have occurred in this trial" (R. 1124).

But, as the court below emphasized (App. A, *infra*, p. 8a), the interrogatories submitted represented only some of the matters of fact the first jury—or any jury—had to pass upon to resolve the ultimate and indivisible issue of defendant's liability upon the theory of breach of implied warranty.* Other matters essential to its decision,

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* The trial court so instructed the jury at the outset of the charge (R. 1106):

> "Your function in this lawsuit is to try and determine the issues of fact. The issues of fact are those material allegations alleged on one side and denied on the other side.
>
> "If you will recall, it is alleged on the plaintiffs' side—No. 1, that Mr. Green died because of the alleged negligence of the defendant; and No. 2, and really in the alternative, although both could be true, that he died because the defendant breached implied warranty of fitness as respects to the cigarettes sold to the deceased."

were covered in the trial court's charge, *e.g.*, proximate cause, reasonable fitness (R. 1115, 1117).*

As part of that charge, the jury was instructed that "you must consider the instructions as a whole" and that "you are permitted to draw from the facts which you find to have been proved such reasonable inferences as seem justified in the light of your own experience" (R. 1107, 1108).

The net results of the jury's consideration of all the evidence in the light of the trial court's instructions, including the interrogatories submitted to it, were general verdicts for defendant of no liability.

Prejudicial Effect of the Error Below

The Court of Appeals having vacated the general verdicts for defendant because of error in the charge, the issue of defendant's liability for breach of implied warranty is

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* The question of reasonable fitness was put to the jury in these terms (R. 1117):

> "Now, the other theory in this case is the theory of implied warranty. The manufacturer of products which are offered for sale to the public in their original package for human consumption or use impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge."

The error in the charge for which defendant's general verdicts have been reversed related to the knowledge element of this charge (App. A, *infra*, p. 7a). The knowledge element reflected not only a matter plaintiffs alleged as part of their warranty claim (R. 4) but one they told the jury it had to decide. In opening to the jury, plaintiffs' counsel told them (R. 35-6):

> "We have also separately charged that they have impliedly warranted that they are fit and safe for human consumption.
>
> "The issue is whether the manufacturer knew of these harmful substances in the product and either failed to remove it or failed to warn the public including Edwin Green, of these harmful substances."

still unresolved and a new jury must now re-decide it. In such a situation the accepted and usual course of judicial proceedings would have been to remand the case for a whole new trial. Instead, under the ruling below, the new jury is to be foreclosed from considering all the evidence bearing on liability and drawing its own inferences in the light of its own experience with respect to factual matters admittedly "directly pertinent upon another trial" (App. A, *infra*, p. 9a).

Unquestionably the new jury will be informed of the former jury's answers to the four interrogatories, either in instructions or in argument of counsel. Just as surely it will not be informed that those answers were reached in conjunction with a general finding of no liability on the part of defendant. To retrieve and preserve for a new trial selected facts—in this case favorable to the plaintiffs—while at the same time obliterating the jury's findings in defendant's favor embodied in the general verdicts now rejected, can only mislead the new jury as to the significance of those answers in re-deciding the issue of defendant's liability. Such a result, we submit, not only raises serious questions concerning the proper purpose and effect of Rule 49(b) interrogatories but also of the permissible extent of judicial re-examination of a jury's findings in light of the right to a jury trial under the Seventh Amendment.

Reasons for Granting the Writ

One important question which has not been, but should be, settled by this Court is whether a jury's answers to interrogatories submitted under Rule 49(b) may be retained to bind the parties on another trial after the jury's general verdict has been vacated and the case remanded to the Dis-

trict Court. Nothing in Rule 49(b) itself and no other authority that we have seen even suggests that such answers may ever be preserved for a new jury trial. We submit that the Court of Appeals' ruling proceeds from a misinterpretation of the proper purpose and application of the Rule.

The second and related question is whether such answers may be preserved if the necessary result will be to divide between two juries the determination of the issue of a defendant's liability to plaintiff. This was the result reached below, since the retained answers concern only some of the factual matters and legal elements of the ultimate issue of defendant's liability for breach of implied warranty—the issue to be retried (*supra*, pp. 5, 7-9). Petitioner believes that such a result has far-reaching implications respecting the right to jury trial as preserved by the Seventh Amendment and is in direct conflict with the principles governing partial new trials first established by this Court in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931). There this Court distinguished between the "substance" of the right to jury trial preserved by the Seventh Amendment and the "old forms of procedure" which it does not perpetuate (283 U. S. at 498). Here, we submit, where the factual matters barred from relitigation are admittedly "directly pertinent" to the issue to be retried (App. A, *infra*, p. 9a), the division of the liability issue between two juries invades the substance of that right and is no mere change in procedure.

I.

The decision below raises novel and important questions of federal procedure involving the proper interpretation and application of Rule 49(b) of the Federal Rules of Civil Procedure.

The ruling below would appear to be based on an erroneous confusion of the purpose and effect of a jury's "written answers" to interrogatories with the quite different use of "special verdicts" under subsection (a) of Rule 49. As one commentator has stated (Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 2B, §1051 (1961 ed.), p. 327):

> "Rule 49 authorizes two very different procedures as discretionary alternatives to the general verdict common in jury cases. Under subdivision (b) the judge may, if he sees fit, ask the jury to return a general verdict, but to accompany it with answers to certain interrogatories as to particular features of the case. Under subdivision (a) the court is given authority to dispense with the general verdict altogether, and to submit the various fact issues in the case to the jury in the form of individual fact questions, as to each of which the jury is to return a special verdict."

Rule 49(b) interrogatories are thus submitted not as a substitute for the general verdict as in Rule 49(a) but "to assist the jury in arriving at a verdict." *Dinicro* v. *United States Lines*, 288 F. 2d 595, 598 (2 Cir. 1961), cert. denied 368 U. S. 831 (1961). They served the same auxiliary function in many states prior to the adoption of the Fed-

eral Rules, as "A New Development in Jury Trial", 13 A. B. A. J. 715, 716 (1927),* points out:

> "The practice of submitting special interrogatories to a jury grew out of an early New England practice of questioning the jury as to the ground of their verdict. There is a clear distinction between this practice and a special verdict: A special verdict is in lieu of a general verdict and the sole basis of judgments; *special interrogatories are merely in aid of a general verdict.* They are never permitted except when a general verdict is returned and are designed to explain and test it.
>
> . . . . . .
>
> "*Special interrogatories are thus given an important but an auxiliary part to play.*" **

Rule 49(b) answers are intended to act merely as a "check" on the general verdict to "explain" or "test" the jury's consistency,*** but the Court of Appeals has treated them here not only as special verdicts but, in effect, as conclusive judgments separate and distinct from the now reversed judgments entered by the trial court. This is evident from its conclusions that the jury's answers to these interrogatories "conclusively established" and "decided" certain "issues" which "[t]he parties may not relitigate" (App. A, *infra*, pp. 9a-10a).

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* This article is referred to by The Advisory Committee on Rules for Civil Procedure in its Note to Rule 49, House Doc. No. 588, 75th Cong., 3d Sess. (1938) at page 45.

** Italics are ours throughout unless otherwise indicated.

*** *E.g.*, Moore, *Federal Practice*, Vol. 5, §49.04 (2d ed. 1951), p. 2209; Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 2B, §1058 (1961 ed.), p. 353; Driver, "A Consideration of the More Extended Use of the Special Verdict," 25 Wash. L. Rev. 43, 44 (1950).

Moreover, the Court of Appeals has manifestly assumed, as a matter of law, that Rule 49(b) answers may properly survive the reversal of general verdicts even when they were entirely consistent with those verdicts. Nothing in the Rule supports this conclusion and no case we have seen reaches a similar result.* Indeed, the application of Rule 49(b) answers contained in the ruling below is contrary to the procedure followed by this Court and the Court of Appeals for the Third Circuit.

In *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273 (1959), an action for wrongful death was submitted to the jury "on special interrogatories covering the issues as to liability and a general charge as to the damages" (360 U. S. at 276). The jury had found, in answer to these interrogatories, that defendant was "negligent", that such negligence "was the proximate cause of the death" of plaintiff's decedent,** and that defendant was guilty of "wanton conduct" which was also a "proximate cause" of the death.*** It had also returned a verdict of substantial damages for plaintiff.

On review in this Court, following reversal in the Court of Appeals, this Court determined that a new trial was necessary because a disputed issue concerning the dece-

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*49(b) does provide that where the answers are consistent with each other but one or more is inconsistent with the general verdict the court *may*, but need not, enter judgment in accordance with the answers. In such circumstances it is presumed that the specific answers are a more accurate determination of the facts than the general conclusion. But in that situation, unlike the case at bar, there is still only one finder of all the facts.

**, *Magenau v. Aetna Freight Lines, Inc.*, 257 F. 2d 445, 447 (3 Cir. 1958).

***, *Magenau v. Aetna Freight Lines, Inc.*, 161 F. Supp. 875, 879 (W. D. Pa. 1957).

dent's employment status had been improperly submitted at the first trial. But this Court refused to limit a retrial to this question and required a full new trial despite the specific jury findings on the issues of the defendant's negligent and wanton conduct. This Court recognized the interrelation of the specific and general issues, saying (360 U. S. at 279):

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

In *Hiltz* v. *Atlantic Refining Co.*, 151 F. 2d 159 (3 Cir. 1945), a seaman sought to recover for tuberculosis he claimed was either contracted or aggravated due to defendant's negligence in the course of his employment on defendant's ship. At trial the jury returned a general verdict for defendant, but, in answer to accompanying interrogatories, it found that defendant had been negligent in heating plaintiff's sleeping quarters, and that plaintiff had been infected with active tuberculosis when he joined the ship so that the defendant's negligence was not the proximate cause of plaintiff's illness.

On appeal, the judgment for defendant was reversed, the court ruling that plaintiff would be entitled to recover if defendant's negligence aggravated an active tuberculosis. In remanding for a full new trial, the Court of Appeals rejected the same contention as plaintiffs here argued in the court below (App. A, *infra*, p. 2a), *i.e.*, that a new trial should be restricted solely to the question of damages, in view of the former jury answers to the other interrogatories. In so doing, the court stated (151 F. 2d at 162):

> "In view of the fact that there is no finding by the jury that the defendant's negligence was the cause of any aggravation of the plaintiff's diseased condition, the futility of the suggestion is apparent. Moreover, the ends of justice require both the plaintiff and the defendant to have their respective days in court at a new trial."

No case has been found reaching a result different from the *Magenau* and *Hiltz* cases and similar to that reached below.

In short, the ruling below now gives Rule 49(b) answers even greater effect than "special verdicts" under Rule 49(a). It is not too much to say that it endows them with the quality of *res judicata* or "law of the case", though it is well established that "it requires a final judgment"—which no longer exists here—to "sustain the application" of those doctrines. *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U. S. 186, 199 (1950).* Indeed, this Court long ago refused to give effect to a jury's special verdict on one question, so as to bind the parties at a subsequent trial, after the judgment entered on the first trial had been reversed. *Smith* v. *McCool*, 83 U. S. 560 (1872). As the Court there stated (at p. 562):

> "If the judgment originally rendered upon the special verdict here in question had still subsisted, the case would be a different one. But that judgment was reversed. *The reversal took away all efficacy from the verdict.*"

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* Similarly, the doctrine of collateral estoppel is "inoperative" where there has not been a "prior judgment". *Yates* v. *United States*, 354 U. S. 298, 338 (1957). And it may not even then be invoked, "[s]o far as merely evidentiary or 'mediate' facts are concerned" (*Ibid.*); see also *Tidewater Oil Company* v. *Jackson*, 320 F. 2d 157, 161 (10 Cir. 1963).

As already noted, two of the Justices of this Court are of the view that the employment of Rule 49 has been attended with much confusion and may easily be used to take away the right of trial by jury (*supra*, p. 7, fn.). The confusion and the need for clarification concerning the purpose, application and effect of the Rule is, we submit, quite evident in this case. The need for review would appear all the more urgent when the ruling below has the effect of dividing between two juries the determination of such an indivisible issue as that of defendant's liability for alleged personal injuries and wrongful death on the theory of breach of implied warranty.

II.

The decision below conflicts with prior decisions of this Court and contravenes petitioner's right to trial by jury as preserved by the Seventh Amendment.

In *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931), this Court considered the effect of the Seventh Amendment upon an interlocutory judgment of a Court of Appeals which had reversed a trial court's judgment entered on jury verdicts and remanded the case for a partial new trial restricted to the determination of damages only. The Court of Appeals had reversed because of errors in the charge with respect to the measure of damages on respondent's counterclaim. The petitioner there contended that "the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is a denial of its constitutional right to a trial by jury" (283 U. S. at 497).

This Court, in reversing and ordering a full new trial on the counterclaim, enunciated the constitutional requirements for partial new trials in these terms:

(1) There must be a "verdict according to law" (*id.* at 499):

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

(2) The issue to be retried must be "distinct and separable" (*id.* at 500):

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."

In *Gasoline Products* this Court found the first requirement satisfied but not the second. The partial new trial ordered by the court below satisfies neither of these requirements.

First, the former jury's answers to interrogatories under Rule 49(b) are not "verdicts" (*supra*, pp. 12-13). Here, the only verdicts were the general verdicts for defendant. Those verdicts no longer stand as a "verdict according to law" because they have been vacated for error of law.

Since nothing was "correctly determined in accordance with the constitutional command" at the first trial (283 U. S. at 498), the substance of trial by jury has not yet been satisfied here. Nor will it be satisfied unless the issue to be redetermined—that of defendant's liability—is retried in full.

Second, the ruling below disregards the constitutional requirement of separability. Here what must be retried is

the issue of defendant's liability. But what is ordered to be retried are not some factual elements of that single issue. And what may not be relitigated are other interrelated factual elements of that issue—though admittedly these are "directly pertinent upon another trial" (App. A, *infra*, p. 9a). For example, one factual element to be retried—whether an article is "*reasonably* fit and wholesome" (App. A, *infra*, p. 7a)—is a matter of degree (see, *e.g.*, 1 Williston on Sales §243 [1948 ed.]), requiring consideration of all the facts and circumstances.

The sharp disagreement in the testimony on all the factual elements placed before the first jury could only have given rise under all the circumstances to conflicting inferences. These the first jury was instructed to resolve (R. 1108) and had to resolve in arriving at its general verdicts for defendant. And as this Court has said, "[t]he very essence" of the jury's function "is to select from among conflicting inferences and conclusions that which it considers most reasonable". *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35 (1944).

But that is precisely what the new jury cannot do under the ruling below. Instead of being permitted to consider all the evidence bearing upon reasonable fitness or any other element entering into the issue of liability, and to draw "such reasonable inferences as seem justified in the light of [its] own experience" (R. 1098), the new jury must now decide that unresolved issue partly on the basis of another jury's inferences and conclusions. The effect of the ruling below is thus to divide between two juries the determination of factual matters related to each other and to the issue of liability to be decided.

Only confusion and uncertainty can result from such a procedure—particularly where the predigested conclusions to be imposed are detached from the context of the "no

liability" verdict. Such "confusion and uncertainty * * * would amount to a denial of a fair trial." *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, *supra*, 283 U. S. 494, 500.

Neither this Court nor any other court has sanctioned the departure from the accepted and usual course of judicial proceedings attempted in the ruling below. Indeed, that ruling, we submit, conflicts with this Court's decisions in *Gasoline Products*, *supra*, and in *Magnum* v. *Aetna Freight Lines, Inc.*, 360 U. S. 273 (1959). Unless now corrected it will deny petitioner its right to a jury trial as preserved by the Seventh Amendment.

Preservation of the right to a jury trial has always concerned this Court. And this Court has found it "particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another" where the ultimate issue can be decided only "in light of all the facts." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 508 (1959). There this Court said (*id.* at 501):

> "We granted certiorari, 356 U. S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick* v. *Schiedt*, 293 U. S. 474, 486."

Petitioner submits that the curtailment evident here should be scrutinized for the same reason.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

EDWARD R. NEAHER
25 Broadway
New York 4, New York
Counsel for Petitioner

JANET C. BROWN
EDWARD C. McLEAN, JR.
CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 Broadway
New York 4, New York
Of Counsel

Dated: March 31, 1964

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was served by mail this 31st day of March, 1964 upon Neal P. Rutledge, 111 N. E. 1st Street, Miami, Florida, and upon Lawrence V. Hastings, 312 Biscayne Building, Miami, Florida, counsel of record for respondents herein, by depositing the same in a United States mail box at 25 Broadway, New York, N. Y. 10004, in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

EDWARD R. NEAHER
Counsel for Petitioner

Dated: March 31, 1964.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(December 11, 1963.)

Before:

RIVES, CAMERON and BELL,

Circuit Judges.

RIVES, *Circuit Judge:*

First, to the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court. *See Green* v. *American Tobacco Co.*, Fla. 1963, 154 So.2d 169; *Green* v. *American Tobacco Co.*, 5 Cir. 1962, 304 F.2d 70, 86. That answer has saved this

Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice. The Supreme Court of Florida has been a very real help in the administration of justice.

Since the opinion of the Supreme Court of Florida, the parties have submitted to this Court additional briefs and oral argument. The appellants, plaintiffs below, would have us enter judgment for plaintiffs on the issue of liability and remand the case to the district court solely for the ascertainment of damages. The appellee, defendant below, insists that the judgments for defendant should be affirmed on grounds other than that decided by the Supreme Court of Florida, or, if the judgments for defendant are not now affirmed, that the case should be remanded for a full new trial.

The Supreme Court of Florida answered in the affirmative the following question certified to it by this Court:

> "'Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?'" 154 So.2d at 170.

The gist of the opinion of the Supreme Court of Florida is contained in the following response:

"Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question certified must therefore be answered in the affirmative." 154 So.2d at 170, 171.

The Florida Court was careful to limit its decision to that single response, saying:

"We note at the outset that all questions of causation and privity are foreclosed by the terms of the question certified, which expressly assumes, as found by the jury's response to interrogatories in the trial of the cause, that defendant's cigarettes caused plaintiff's fatal cancer. We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions nor does it request a statement of the scope of warranty implied in the circumstances of this case. The inquiry before us is, instead, limited to the status of Florida law upon imposition of liability 'as for breach of implied warranty' when the manufacturer or warrantor 'could not, by the reasonable application of human skill and foresight, have known of the danger.' . . .

". . . As already indicated, we do not feel that the inquiry in terms either requests a response on the ultimate issue of liability in this case or requires any comment on the disposition of issues between the court and jury under the law relating to scope and breach of the implied warranty that a product sup-

plied for human consumption shall be reasonably fit and wholesome for that general purpose." 154 So.2d at 170, 171.

What issues, then remain in the case? Clearly, the only issues as to defendant's liability are those relating to implied warranty. As shown in our original opinion, *Green v. American Tobacco Company, supra*, 304 F.2d at p. 71, the plaintiffs asserted in separate counts six theories of liability, four of which were decided by the district court as matters of law against the plaintiff. On appeal, no error was claimed as to those rulings. The district court submitted the case to the jury upon only two theories of liability, breach of implied warranty and negligence. On appeal the plaintiffs accepted the jury's finding that the defendant was not liable for negligence. The only theory of liability remaining in the case is that of implied warranty.

On Count 1 charging a breach of implied warranty, the jury returned general verdicts for the defendant and also answered the four written interrogatories submitted under Rule 49(b), Fed.R.Civ.P., which were quoted in our original opinion, 304 F.2d at 71, 72.

The defendant insists that the scope of its implied warranty was so limited that there was a total lack of evidence to support plaintiffs' claim of breach and, hence, that the judgments for the defendant must be affirmed notwithstanding the opinion of the Supreme Court of Florida. In varying ways the defendant describes what it claims to be the limited scope of its implied warranty; e.g., (a) "that the article must be of the same quality, material, workmanship and availability for use as others sold under the same trade name"; (b) that "there was [no] foreign substance or . . . spoiled, contaminated or other substandard ingredient which caused the injury, and such substance or

ingredient reflected a material difference between the article which caused the injury and the usual article sold under the same trade name"; (c) that "the Florida Supreme Court's rule is only that a product must be 'reasonably fit and wholesome' and have a 'reasonable fitness for human use or consumption'."

We need not review the Florida decisions as to the defendant's claimed limitations, such as those lettered (a) and (b), *supra*; for, whatever may be the general rule, very clearly the law of this case has established the scope of the implied warranty substantially as that lettered (c), *supra*.

There has never been presented by the evidence any contention that Lucky Strike cigarettes were more dangerous or had a greater propensity to cause lung cancer than cigarettes bearing other brand names. Nor has there been any contention that the cigarettes which Mr. Green smoked contained any foreign substance, or any spoiled, contaminated or other substandard ingredient which caused his injury and death. Instead, plaintiffs' contention from the beginning has been that cigarettes—not Lucky Strike cigarettes alone—cause lung cancer. If defendant's claimed limitations such as those lettered (a) and (b), *supra*, are true and sound limitations of the scope of its implied warranty, then the question which we certified to the Supreme Court of Florida and the responsive opinion of that Court have been mere useless abstractions.

In submitting the case to the jury, the district court charged as follows:

> "The manufacturer of products which are offered for sale to the public in their original package for human consumption or use *impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold*, but such implied warranty does not cover substances in the manufactured prod-

uct, the harmful effects of which no developed human skill or foresight can afford knowledge." (Emphasis supplied.)

That instruction was taken verbatim from plaintiffs' requested written charge No. 11 (R. pp. 1127, 1128), as to which the plaintiffs consented to the insertion of the adverb "reasonably" to modify "wholesome or fit" (R. p. 1075). The defendant made no objection to that part of the charge which we have emphasized, *supra*. That part was also substantially included in plaintiffs' requested but refused Charge No. 10 (R. p. 1126). As a part of the law of this case the parties are, therefore, bound by the scope of the implied warranty as so defined by the district court.

Further, while the Supreme Court of Florida, in its advisory opinion, declined to pass on the scope of warranty implied in the circumstances of this case, its footnote 11 (154 So.2d 172) impliedly rejected the "foreign-natural" test, and in the last quotation which we have made from the opinion, *supra* p. 2, it referred to ". . . the implied warranty that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose." That is, we conclude, a correct definition of the scope of the implied warranty under the law of Florida. *See McBurnette* v. *Playground Equipment Corporation*, Fla. 1962, 137 So.2d 562, 565. Certainly it is the definition by which the parties are bound as a part of the law of this case.

The defendant argues, however, that, even under that definition, it was entitled to a directed verdict because there was no evidence that Lucky Strike cigarettes were not "*reasonably* fit and wholesome." To products intended for human consumption, and the use of which may cause injury or death, the jury may properly apply a very strict standard of reasonableness.

Without examining the other voluminous evidence, a single reference to the testimony of Dr. Ernest L. Wynder will suffice to show that there was evidence from which the jury could properly conclude that the standard of reasonableness had been breached. Dr. Wynder testified that "smoking was a main factor in lung cancer" (R. 119); that the "risk of a very heavy smoker to develop lung cancer is at least twenty times greater than a non-smoker" (R. 135); that "the major cause of epidermoid lung cancer in man is cigarette smoking" (R. 142); that "the major factor that produces lung cancers in American males is smoking" (R. 186). Dr. Wynder conceded "that the vast majority of smokers do not get lung cancer" (R. 186, 187), but by "vast majority" he meant that "one in nine or one in ten" do develop lung cancer. (R. 188.) If the jury agreed with the testimony of Dr. Wynder, it could have reasonably inferred that the cigarettes were not "*reasonably* fit and wholesome." We conclude that the defendant was not entitled to directed verdicts on any of the grounds urged. We agree with the Supreme Court of Florida that "the general verdict for defendant was responsive to the trial court's instruction that 'implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can afford knowledge.'" 154 So.2d at 170. In conformity with the opinion of the Supreme Court of Florida that that instruction was erroneous, the judgments for the defendant must be reversed.

It does not, however, follow, as urged by the plaintiffs, that we should render judgments for plaintiffs on the issue of liability. The jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were "*reasonably* fit and wholesome." The jury did find that the smoking of Lucky Strike cigarettes on the part of the decedent, Green, was a proximate

cause of the development of cancer in his left lung which caused his death. It is possible, however, that those findings are consistent with the standard of reasonableness, for as this Court recently said: "Strict liability on the warranty of wholesomeness, without regard to negligence, 'does not mean that goods are warranted to be foolproof or incapable of producing injury . . . .'" *Lartigue v. R. J. Reynolds Tobacco Company*, 5 Cir. 1963, 317 F.2d 19, 37.

The plaintiffs urge that the defendant waived any further finding on the question of reasonableness by not requesting the submission of any interrogatory in addition to the four quoted in our original opinion, 304 F.2d at 71, 72. It must be remembered, however, that the district court did not require the jury "to return only a special verdict in the form of a special written finding upon *each issue of fact*" as permitted by Rule 49(a), Fed.R.Civ.P., but, instead, followed the procedure outlined in Rule 49(b) to "submit to the jury, together with appropriate forms of a general verdict, written interrogatories *upon one or more issues of fact* the decision of which is necessary to a verdict." It appears from the district court's charge to the jury that the written interrogatories were not intended to cover each and every issue of fact, but, "they are interrogatories which counsel described in their arguments, seeking to find from you your opinion on *certain factual matters* that have occurred in this trial." (Emphasis supplied.) It undoubtedly is true that the interrogatories submitted what the parties then considered to be the prime or important issues of fact, but, in the absence of any other evidence of waiver, and in the light of that part of the court's charge submitting the issues of reasonableness to the jury, which has been quoted, *supra* p. 4, we conclude that the defendant is not foreclosed from urging that issue on another trial. As said in *Moulor v. American Life Insurance Co.*, 1884, 111 U.S. 335, 337, the defendant's "will-

ingness, at one trial, to risk its case before the jury, upon a single one of several issues made, did not preclude it, at a subsequent trial, from insisting upon other defenses, involving the merits, which had not been withdrawn of record, or abandoned in pursuance of an agreement with the plaintiff."[1]

With much force, the plaintiffs urge that "relitigation of defendant's liability herein would be unusually onerous because of the enormous amount of time, energy, and money required." The former trial took ten days, most of the time being devoted to issues relevant to liability vel non. As said in our original opinion, "the testimony at the trial was concerned principally with the issues of whether Mr. Green's death was caused by a cancer originating in the lung, that is, primary lung cancer, and whether that cancer was caused by his smoking of Lucky Strike cigarettes. Eight eminent medical doctors testified on each side." 304 F.2d at 72. A large part of the burden and expense necessary to be incurred by any of the parties may be obviated by observing that upon another trial, any party may introduce such part of the relevant evidence on the former trial as may be desired.

Further, while the general verdicts for the defendant are vacated, the parties are nonetheless bound by the jury's answers to the written interrogatories. The answers to (1), (2) and (3) (304 F.2d 71, 72) will be directly pertinent upon another trial. The parties may not re-litigate the issues thus already decided under the guise of presenting evidence on the issue of reasonableness, that is, as to whether the cigarettes were *reasonably* fit and wholesome. The evidence to be adduced on that issue must assume as

[1] To similar effect, see Chase v. United States, 1921, 256 U.S. 1, 10; Davis v. O'Hara, 1924, 266 U.S. 314, 321; 5 Am.Jur. 2d Appeal and Error, §955, p. 382, n. 12; 5B C.J.S. Appeal and Error, §1989, p. 637, n. 25

already conclusively established the issues decided by interrogatories (1), (2) and (3).

While the answer to interrogatory (4) no longer has any relevance to the question of defendant's liability, it does, in our opinion, effectively foreclose another issue which the defendant now urges; that is, that "plaintiff would have to satisfy the jury . . . that Mr. Green purchased Lucky Strike cigarettes 'in reliance upon' defendant's implied warranty."

The element of "reliance" in implied warranty liability is touched upon by the Supreme Court of Florida in its response, 154 So.2d at 172, 173. It is said that this liability is related to "the reliance by the buyer on the seller's judgment." Reference is made to an article by Dean Prosser in which he says: "The only 'reliance' which it involves is reliance upon the seller's undertaking; as it is reasonably understood by the buyer." The opinion refers also to the decision in *Lambert v. Sistrunk*, Fla. 1952, 58 So.2d 434, denying a merchant's liability for sale of a defective stepladder. In that case the Florida Court drew the distinction between the class of cases where the buyer relies on the seller's judgment and those in which there is no reliance, as follows:

> "There is no need to dwell on the class of cases where the buyer relies upon the seller's judgment of the fitness of a particular article for the purpose intended, because the use of a stepladder is as well known to a buyer as to a seller and is as limited as it is well known. This feature is common to the lipstick involved in Smith v. Burdine's, Inc., supra [198 So.2d 225]. The difference, as we have already observed, is in the nature of the articles sold. One cannot know the ingredients of a lipstick without chemical analysis. One can know as much as a salesman of a stepladder by simply looking at it. And this lack of opportunity to inspect was

also a factor in the case of Blanton v. Cudahy Packing Co., supra [49 So.2d 313]."

Lambert v. Sistrunk, supra, 58 So. 2d 435.

Again the response of the Supreme Court of Florida in this case states that ". . . the basis of such liability is the undertaking or agreement, attributed by law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes." 154 So.2d at 171. While the response advises that ". . . manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty . . ." (154 So.2d at 170), it would appear that the buyer is assumed to rely upon the seller's judgment in cases where the buyer neither knows nor has an opportunity to know of the unfitness or unwholesomeness. In such cases there is an undertaking or agreement on the part of the seller to be responsible in the event the cigarettes (to be specific) are not in fact reasonably wholesome or fit for human consumption.

It would be obviously impossible for the plaintiffs to prove any conscious or express reliance by Mr. Green on defendant's implied warranty. What the evidence does establish, and what the jury has in effect found, is that the circumstances of this case are such that it must be assumed that Mr. Green purchased the Lucky Strike cigarettes "in reliance upon" the defendant's implied warranty. That is no longer an issue in this case.

Finally, pointing to plaintiffs' requested instruction No. 10, the defendant insists that before finding for the plaintiffs, the jury must find that the cigarettes caused injury "while being used in a normal manner." A plea of contributory negligence is obviously opposite to a claim

based on breach of implied warranty. However, an implied warranty encompasses only the ordinary use or purposes for which the article is sold. It seems to us that Mr. Green's smoking of the Lucky Strike cigarettes, as described in our original opinion (304 F.2d at 72), even to the extent of from one to three packages per day, was so clearly a matter to be expected among many smokers, and within the use or purposes for which the cigarettes were sold, as not to leave this element as a real issue in the case, unless on another trial a different state of facts is presented.

We believe that we have discussed all of the remaining issues suggested by the defendant. We have done so in the hope of more sharply defining the issues yet to be decided. It is our purpose, however, to aid, and not to limit more strictly than necessary the judgment and discretion of the district court. In simple summary, the parties are bound by the answers to the four interrogatories; any issue not inconsistent with those answers may be presented upon another trial. What has been said should be a sufficient guide for the district court, by further pretrial hearing or otherwise, to keep the issues within proper limits.

The judgments are reversed and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CAMERON, Circuit Judge, Concurring in part and in part dissenting.

The majority opinion in this case is a careful and accurate portrayal of the status of the case as it now stands before us. And it is a correct interpretation of the holding of the Supreme Court of Florida so far as it holds that the judgments of the court below must be reversed and the case remanded. I cannot join, however, in its conclusion that

we should not render judgments for plaintiffs on the issue of liability.

I.

For convenience, I quote the paragraph of the majority opinion which announces this latter conclusion—the point at which I am compelled to part company with my brethren:

> "It does not, however, follow, as urged by the plaintiffs, that we should render judgments for plaintiffs on the issue of liability. The jury has not made any sufficient finding on the question of reasonableness, that is, as to whether or not the cigarettes were *'reasonably* fit and wholesome.' The jury did find that the smoking of Lucky Strike Cigarettes on the part of the decedent, Green, was a proximate cause of the development of cancer in his left lung which caused his death. It is possible, however, that those findings are consistent with the standard of reasonableness, for as this Court recently said: 'Strict liability on the warranty of wholesomeness, without regard to negligence, "does not mean that goods are warranted to be foolproof or incapable of producing injury . . ."' Lartigue v. R. J. Reynolds Tobacco Company, 5 Cir., 1963, 317 F.2d 19, 37."

In order to demonstrate that *Lartigue* is not authority in this case, and that the majority fell into fatal error when it announced the foregoing quoted language as the basis for its conclusion that the plaintiffs were not entitled to a directed verdict on liability, it is necessary to set out substantially all of the paragraph in *Lartigue*, a portion of which the majority has quoted above. This is done in a footnote, and the textbook language which *Lartigue* quoted is italicized to separate it from this Court's language (317

F.2d 37, paragraph numbered [18].[1] *Lartigue* was quoting from a textbook based upon a California Appellate Court case which announced law which is wholly inconsistent with the law of Florida.

It is fair to say, I think, that the majority's entire reliance on *Lartigue* and the principles it stands for are in direct conflict with the decisions of Florida courts, including the specific holding of its Supreme Court in its answer to the question we certified to it (154 So.2d 169, 172-173).

II.

The majority here finds itself, I submit with deference, in the anomalous position of resting its decision as to the most crucial point in this case upon *Lartigue*, which in turn went astray because it bottomed its holding on the portion (304 F.2d at 73-77) of this Court's *original* opinion which was rejected by the Florida Supreme Court upon our submission to it. The vital language of *Lartigue* (317 F.2d

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[1] "Strict liability on the warranty of wholesomeness, without regard to negligence, *'does not mean that goods are warranted to be foolproof or incapable of producing injury * * * By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory.'*" The article sold must be unreasonably dangerous to the ordinary consumer, with the knowledge common to the community as to its characterization. For example, sugar is unwholesome to diabetics. Ice cream and butter may contain sufficient cholesterol to be unwholesome to persons with high blood pressure, and heart trouble. Whiskey is unwholesome to alcoholics. Diabetics who eat sugar, heart cases who cannot resist ice cream or butter, and alcoholics who drink too much whiskey know that the strict warranty of unwholesomeness puts no money in the bank for them. . . .

"'2 Harper & James, Law of Torts, § 28.22, p. 1584 (1961).

"'*In a recent California case the Court said "The essential inquiry, thus, is the same in respect to the breach of warranty theory as to the negligence claim: whether the defendant complied with the standard of reasonable care in ascertaining the fitness of the chattel for the use for which he knew it was hired." Tarstein v. Licht, 1959, 174 Cal.App.2d 855, 345 P.2d 511.*'".

37 39) was based upon, and in considerable part repeated, these rejected holdings of this Court's original opinion.

It follows, it therefore seems to me, that whatever may be the force of *Lartigue*—decided two months before the Florida Supreme Court answered our question—in deciding a Louisiana case, it is no authority at all in this case based upon Florida law. Under that law it is not true that "By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory." The direct opposite is true. The instruction given by the court below and its accompanying Question No. 4 were predicated directly upon the negligence theory. Florida rejects that theory and holds that sales of goods for human consumption are not covered by the law of sales with its *caveat emptor* or the law of negligence with its doctrines of reasonable care. Instead, they are controlled entirely by the law of contracts. The contract here was between the Tobacco Company and Green. The warranty embodied by the law in every sale the Company made to him was that the cigarettes purchased by him would not do him harm.

It would, in my opinion, be a complete rejection of the law of warranty to hold that it could abrogate the requirement that one admittedly injured by the use of tobacco could not recover unless he showed farther that the cigarettes were not reasonably fit and wholesome for use by the general public. Those words are used in the warranty to demonstrate the universality of its application. Every sale it makes carries a warranty to each and every member of the public. But each warranty is separate and covers the liability of the Tobacco Company to each separate individual to whom a sale is made. The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida with which alone we are dealing.

III.

The question here under consideration is, in reality, the same question which was debated at great length between the majority and the dissenting opinions in the initial decision of this case by this Court.[2] A reading of those two opinions will, it seems to me, cover essentially the point of difference which still persists between the majority and myself. I think no good purpose will be served by repeating the argument made in that dissent and that it is sufficient to refer to it. I undertook to analyze every applicable Florida case and to demonstrate that under the Florida cases, Question No. 4 should not have been submitted to the jury. The Supreme Court of Florida has decided the point submitted against the holding of the majority in that case and in favor of the arguments set forth in my dissent.

In answer to the question we addressed to the Supreme Court of Florida, which the parties stipulated as encompassing the question which would decide the outcome of this litigation; the Supreme Court of Florida answered in effect as follows:

> Yes, the law of Florida imposes on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, notwithstanding the fact that the defendant manufacturer and distributor could not, on or before February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes

[2] Green v. American Tobacco Company, June, 1962, 304 F.2d 70, dissenting opinion, 77.

would be endangered by the inhalation of the mainstream smoke from such cigarettes, of contracting cancer of the lung.

It seems certain that, when we submitted that question, the members of the Court thought its answer would dispose of the case. The parties evidently thought the same thing; because they agreed to the asking of this question. I see nothing else for the jury to pass upon, unless the Tobacco Company is to be permitted to bring in a hundred or a thousand witnesses whom Lucky Strike Cigarettes have not yet harmed, in an effort to show that the warranty given by the Tobacco Company to Green was not in fact broken.

But the record before us reveals no effort by either party to show that the cigarettes were not reasonably fit and wholesome as to any person besides Green. If that be the thrust of the majority opinion, I think it is fair to say that neither party raised such an issue in the arguments before us on the trial of the original appeal; that this Court never conceived that such an issue was in the case; that the Supreme Court of Florida has not intimated that such an issue does remain in the case, and that no Florida decision is cited—and none can be found by me—which holds such an issue to be relevant to a trial upon implied warranty.

The law seems to be settled that:

> "In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for a rehearing . . ." 5 Am. Jur. 2d, Appeal and Error, 987, page 412.

I think that the judgment below should be reversed and remanded for trial of the issue of damages alone. I, therefore, respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana

JAN 15 1964

[SEAL]

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 19003

D. C. Docket Nos. 3070-M-Civil & 8505-M-Civil

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus.

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before:

RIVES, CAMERON and BELL,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, on rehearing and reargument by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered and adjudged that the appellee, American Tobacco Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in part and dissents in part" December 11, 1963

Issued as Mandate:-

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(May 2, 1962)

Before RIVES, CAMERON and BELL, *Circuit Judges.*

RIVES, *Circuit Judge:* Edwin Green, Sr.,[1] brought suit against American Tobacco Company in December 1957, claiming that he had incurred lung cancer as a result of smoking defendant's product, Lucky Strike cigarettes. A few months later, on February 25, 1958, Mr. Green died. Under the Florida Survival Statute,[2] the claim survived, and Mr. Green's son, Edwin Green, Jr., appointed administrator of his estate, was substituted as plaintiff.[3] The widow, Mary Green, also filed suit under the Florida Wrongful

[1] Section 45.11, Florida Statutes 1959.

[2] Rule 25 (a), Federal Rules of Civil Procedure.

Death Statute.[1] The two suits were consolidated by order of the district court, and came on for jury trial upon an amended complaint which asserted in separate counts six theories of liability: (1) Breach of Implied Warranty; (2) Breach of Express Warranty; (3) Negligence; (4) Misrepresentation; (5) Battery; and (6) Violation of the Federal Food, Drug and Cosmetic Act, the Federal Trade Commission Act, and the Florida Food, Drug and Cosmetic Act.

At the close of the plaintiffs' evidence, in a ruling not questioned on appeal, the district court sustained the defendant's motion for a directed verdict on all counts except Count 1, breach of implied warranty, and Count 3, negligence. At the close of all the evidence, the defendant renewed its motion for directed verdict on those two counts. The court reserved its ruling on that motion; and submitted the cases to the jury upon the two theories of liability, breach of implied warranty and negligence. The jury returned general verdict for the defendant, and answered written interrogatories submitted under Rule 49(b), Federal Rules of Civil Procedure, as follows:

> "(1) Did the decedent Green have primary cancer in his left lung?
>
> "Yes.....X.....
>
> "No.....
>
> "If your answer is 'Yes,' then
>
> "(2) Was the cancer in his left lung the cause or one of the causes of his death?
>
> "Yes.....X.....
>
> "No.....
>
> "If your answer to the above question is 'Yes,' then

[1] Sections 768.01, 768.02, Florida Statutes 1959

"(3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung?

"Yes.....X.....

"No.....

"If your answer to the above question is 'Yes,' then

"(4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known the users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?

"Yes.....

"No.....X....."

Upon the jury's verdict, judgment in each case was entered for the defendant. A cost judgment against the plaintiffs was entered in the amount of $1,969.74, which included $900.00 for expert witness fees assessed at the rate of $100.00 each.

Upon appeal, the plaintiffs present no questions as to the rulings on Count 2, negligence, but restrict their contentions to the theory of Count 1, implied warranty. As stated in their brief:

"Three questions only are presented by these appeals:

"(1) Under the Florida doctrine of implied warranty are not the plaintiffs entitled to judgment as a

matter of law, as requested in their post-trial motions under Rule 49(b), based upon the jury's special findings that the smoking of defendant's Lucky Strike cigarettes proximately caused the plaintiffs' decedent to contract a fatal case of cancer of the lung?

"(2) Did not the trial Judge err in refusing to grant plaintiffs' requested charges on the issue of implied warranty and in charging instead that the implied warranty of fitness which a manufacturer under Florida law is held to make depends upon the ability of the manufacturer to know about the harmful substances in its product?

"(3) Did not the trial Judge err in taxing as costs against the plaintiffs a total of nine expert witness fees in the amount of $100.00 per expert, such sums being beyond the amount allowable and authorized by Federal statute?"

Edwin Green, Sr. began smoking Lucky Strike cigarettes in 1924 or 1925 when he was about 16 years old. He smoked from one to three packages per day until early 1956, when his physician advised him that he had contracted cancer of the left lung. By the time of diagnosis the cancer was no longer operable or curable. Ameliorating treatment was given, but the cancer proceeded on its typical, fatal course, and resulted in Mr. Green's death on February 25, 1958.

The testimony at the trial was concerned principally with the issues of whether Mr. Green's death was caused by a cancer originating in the lung, that is, primary lung cancer, and whether that cancer was caused by his smoking of Lucky Strike cigarettes. Eight eminent medical doctors testified on each side. They were in sharp disagreement. The district court properly submitted to the jury the questions

of medical causation.[1] Their testimony was also in conflict on whether by February 1, 1956, when it was first discovered that Mr. Green had lung cancer, scientific knowledge had progressed to such an extent that the defendant could, by reasonable foresight, have learned that the smoking of cigarettes was a probable cause of lung cancer.

Plaintiff-appellants state their main insistence as follows:

> "The fundamental point upon which the plaintiffs rely on this appeal is that the Trial Court erred, as a matter of law, in ruling that the implied warranty of fitness which a manufacturer of products for human consumption is held by Florida law to make does not cover deleterious substances in its products, the harmful effects of which are unknown to the manufacturer and could not have been known by any developed human skill or foresight. Plaintiffs contend that the knowledge of the manufacturer is irrelevant and immaterial to the manufacturer's liability on an implied warranty under Florida law, and that a manufacturer's implied warranty is not limited to harmful substances of which the manufacturer either had knowledge, or should have had knowledge, or could have had knowledge according to developed human skill and foresight."

With that insistence we cannot agree. To the contrary, we are convinced that the doctrine of implied warranty by a manufacturer and seller of the qualities and fitness of the thing sold for the purpose for which it is intended or desired is founded on his superior opportunity to gain knowledge of the product and to form a judgment of its fitness.

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[1] *Montgomery v. Stone*, Fla. 1955, 84 So. 2d 34, 39; *Wetzel v. Robinson*, Fla. 1958, 102 So. 2d 385, 386; See *Great American Indemnity Co. v. Holloway*, 5 Cir., 1960, 286 F. 2d 106, 108-109

That principle can clearly be deduced from all of the Florida cases on implied warranty whether by the manufacturer or by the dealer.

In the comparatively early case of *Berger* v. *E. Berger & Co.*, Fla. 1918, 80 So. 296, a dealer was held liable on an implied warranty that a lot of lumber was fit for the purposes for which the dealer knew that it was purchased. The court quoted at some length a passage from Benjamin on Sales (5th ed.) 595, beginning with the sentence: "An implied warranty, or as it is called, a 'covenant in law as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason." 80 So. at 299. The court concluded:

> "We think the rule is well established which embodies the principle above quoted that where a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies it and that the purchaser has no opportunity to inspect the article, but relies upon the judgment of the seller, there is an implied condition or 'warranty,' as it is called, that the article is fit for the purpose to which it is to be applied."

In *Smith* v. *Burdine's Inc.*, Fla. 1940, 198 So. 225, 227, 228, a buyer requested of a saleslady at a cosmetic counter a good lipstick. The saleslady selected a certain lipstick and recommended it for its intended use. The lipstick contained a poisonous substance which allegedly injured the health of the buyer. In an action for breach of implied warranty of fitness the trial court directed a verdict for the defendant. The Florida Supreme Court reversed and held that whether the buyer relied on the judgment of the saleslady was for the jury, saying:

> "The existence or non existence of an implied warranty of fitness for a particular purpose must and necessarily does depend upon whether or not the buyer relied upon his own judgment at the time of the purchase or relied on the skill or judgment of the seller, and this is a question of fact to be determined by a jury under appropriate instructions." (198 So. 229.)

In *Blanton vs Cudahy Packing Co.*, Fla. 1944, 19 So. 2d 313, a manufacturer or canner of a meat product, known as "Tang," sold to the retailer in sealed packages or cans was held liable to the ultimate consumer for breach of an implied warranty that such product is wholesome and fit for human consumption. The court said in part:

> "The implied warranty theory of liability comports with the general trend of the best reasoned cases. The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end." (19 So. 2d at 316.)

In *Cheff v. Lenderdale Biltmore Corporation*, Fla. 1949, 39 So. 2d 476, a guest sued the proprietor of a hotel dining room, claiming that he had become ill as the result of eating impure or unwholesome food. The action was based "on the theory of an implied warranty that the food was fit for human consumption." (39 So. 2d 476.) The trial court sustained a demurrer to the complaint. The Florida Su

preme Court reversed. In the course of its opinion, it quoted from *Cushing* v. *Rodman*, 65 App. Div. D. C., 82 F. 2d 864, 868, a passage beginning: "'The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor. . . .'" Continuing, the Supreme Court of Florida said:

> "Indeed, it would seem that if any distinction were to be drawn between the retailer and the restaurant keeper, in such a transaction, the duty of the latter should be greater than that of the retailer who in many instances has no better opportunity for knowledge of the fact that certain foods may contain deleterious substances than has the ultimate consumer who purchases the article. For in a sense the restaurant keeper is the direct manufacturer of the meals he prepares in his own kitchen and serves to his guests in his dining room. It is hardly possible to think of any dishes prepared by him wherein his opportunity for knowledge of the ingredients is not far greater than that of the customer, hence he is in a position largely, if not entirely, denied to the guest to judge of their fitness before he serves them. As between the paying guest, who has no real means of determining whether the meal served is fit for human consumption, and the restaurateur, who is in a position to determine this fact before and during the period of preparation, the burden should properly rest with the one who has or should have such facilities to keep the food pure and fresh as to make an injury to the customer from their use highly improbable if not possible." (39 So. 2d at 478.)

In *Lambert* v. *Sistrunk*, Fla. 1952, 58 So. 2d 434, 435, the Florida Supreme Court held that there was no implied

warranty arising from statements by defendant's salesmen that a stepladder was strong and would last a lifetime and that plaintiff would never break it. In part the Supreme Court of Florida said:

> "It has been said that the concept of implied warranty rests upon the foundation of business ethics and constitutes an exception to the maxim 'let the buyer beware,' itself encompassing the idea that there is no warranty implied with respect to the quality of the goods being sold. To come into play, the exception must therefore spring from some moral obligation on the part of the seller, or perhaps more accurately, on the breach of some such duty amounting to fraud or the taking advantage of the buyer by reason of some superior knowledge in the seller, or the reliance by the buyer on the seller's judgment.
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> * * * * * *
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> "There is no need to dwell on the class of cases where the buyer relies upon the seller's judgment of the fitness of a particular article for the purpose intended, because the use of a stepladder is as well known to a buyer as to a seller and is as limited as it is well known. This feature is common to the lipstick involved in Smith v. Burdine's, Inc., supra [Fla. 1940, 198 So. 223]. The difference, as we have already observed, is in the nature of the articles sold. One cannot know the ingredients of a lipstick without chemical analysis. One can know as much as a salesman of a stepladder by simply looking at it. And this lack of opportunity to inspect was also a factor in the case of Blanton v. Cudahy Packing Co., supra [Fla. 1944, 19 So. 2d 3131."

See also *Florida Coca Cola Bottling Co. v. Jordan*, Fla. 1953, 62 So. 2d 940; *Hoskins v. Jackson Grain Co.*, Fla. 1953,

63 So. 2d 514; *Food Fair Stores of Florida* v. *Macarda*, Fla. 1957, 93 So. 2d 860; and *Miami Coca Cola Bottling Co.* v. *Todd*, Fla. 1958, 101 So. 2d 34.

The appellants rely most strongly upon two very recent cases decided by the Supreme Court of Florida. *Seneer* v. *Carl's Markets*, Fla. 1950, 45 So. 2d 671, and *Carter* v. *Hector Supply Co.*, Fla. 1961, 128 So. 2d 390. In *Seneer* v. *Carl's Markets, supra*, it was held that a retail dealer in food products sold in sealed packages or cans is liable to the consumer on the theory of implied warranty for injuries sustained because of a deleterious, unwholesome or unfit substance for human consumption appearing in the sealed package or can. The trial court had sustained demurrer to the plaintiff's complaint. The Supreme Court of Florida reversed, two justices dissenting, two concurring specially, and three concurring in an opinion in effect approving the argument of counsel for appellants stated as follows:

> "Counsel for appellants point out that the duty to offer and sell wholesome food in sealed cans and packages to the consuming public should rest alike on the manufacturer and retailer because the retailer is experienced in buying from the manufacturers; he is acquainted with the products and the manufacturers; he relies upon representations made to him. The public is vitally concerned in wholesome food or its health will be jeopardized and a legal distinction as to liability as between the manufacturer and retailer should not exist." (45 So. 2d 673.)

Justice Hobson concurring specially, in an opinion in which he was joined by Justice Terrell, stated:

> "Furthermore, I am of the opinion that the retailer who is sued and against whom judgment might be secured, should, in turn, be allowed to sue the manu-

> ufacturer, which is the reason for my disagreement with the views expressed by Associate Justice Fillman. I do not follow his thought that holding a retail grocer liable in a case of this character would result in bankrupting the individual independent grocer. The retail merchant can avoid placing himself in a position wherein he could not, in turn, sue the manufacturer by electing to purchase only from responsible manufacturers within the jurisdiction of the courts in which he might enter suit." (45 So. 2d 673.)

Thus, the implied warranty by the retailer was sustained not only because of the retailer's better position in selecting and dealing with the manufacturer, but because the retailer had a right of indemnity over against the manufacturer.

In *Carter v. Hector Supply Co., supra*, the action was by an injured employee of a purchaser of a riding sulky against the retailer. The Florida Supreme Court held that the employee could not impose liability on the retailer on the basis of implied warranty because of absence of privity of contract. That point is not important here because in this litigation no privity defense was raised.

In the course of its opinion, however, the Florida Supreme Court did say that the employee "relied entirely on an alleged implied warranty in order to impose absolute liability regardless of fault on the retailer with relation to whom there was no privity." Further in the course of the opinion, the Florida Supreme Court disagreed with the holding of the District Court of Appeal (42 So. 2d 22) to the effect that proof of actual or implied knowledge of the defect on the part of the retailer is essential to his liability on an implied warranty. The Supreme Court of Florida said:

> "The ultimate holding of the court of appeal is to the effect that proof of actual or implied knowledge of

a defect on the part of a retailer is essential to his liability on an implied warranty in an action brought by one other than the purchaser. The court of appeal relied upon Lambert v. Sistrunk, Fla. 1952, 58 So. 2d 434. Here again we think its confidence was misplaced for the simple reason that Lambert involved a direct purchaser-seller situation in which the purchaser had an opportunity equal to that of the seller to inspect the item purchased. It did not involve a third-party effort to impose implied warranty responsibility on a retailer.

The instant holding of the court of appeal, however, is essentially correct in finding that a retailer could be held liable to a third party in a *negligence action* as contrasted to absolute liability under an *implied warranty* only if the retailer could be charged with actual or implied knowledge of the defect. Again we emphasize that in the case at bar Carter relied entirely on an alleged implied warranty in order to impose absolute liability regardless of fault on the retailer with relation to whom there was no privity. Finding as we do that the lack of privity between these parties precluded the implication of a warranty, the plaintiff would necessarily be relegated to an action in tort for negligence. Actually this, in effect, is where the ultimate judgment of the court of appeal placed him. In that event, in the type of situation immediately before us, it would be necessary for him to prove that the retailer knew, or should have known, of the defective condition of the commodity. To this extent the court of appeal ruled correctly in holding that proof of this element would support a finding of fault on the part of the retailer. This is in direct contrast with the rule that such proof is wholly unnecessary in an implied warranty situation." (128 So. 2d 392.)

The actual holding of the court was thus expressed:

> "The sum of our holding here simply is that one who is not in privity with a retailer has no action against him for breach of an implied warranty, except in situations involving foodstuffs or perhaps dangerous instrumentalities, a problem not presently here." (128 So. 2d 393.)

If the language in *Carter v. Hector Supply Co., supra*, relied on by appellants, is anything more than dictum, it does not go so far as to sustain the appellants' position in the present case. It does not say that it is immaterial that the manufacturer could not have known or had no opportunity to gain knowledge, or to form a judgment as to the dangerous qualities of the product manufactured and sold.

We think, therefore, that the jury's general verdicts for the defendant are sustained by its negative answer to special interrogatory No. 4:

> "No. 4. Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?"

The defendant could not be held liable as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge. The district court did not err in charging the jury that,

> "... The manufacturer of products which are offered for sale to the public in their original package for human consumption or use impliedly warrants that its products are reasonably wholesome or fit for the pur-

pose for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge."

Founded on the presumed intention of the parties and upon reason is the doctrine that the existence or non-existence of an implied warranty of fitness for a particular purpose depends upon whether or not the buyer, at the time of the purchase, relies on the skill and judgment of the seller. The buyer is presumed so to rely only when the seller is thought to have a superior opportunity to exercise such skill, or to gain knowledge of the product or of its source, and hence to form a better judgment of its fitness. The common sense of that doctrine may be appreciated by foreseeing its probable application to three different classes of products intended for human consumption: (1) those believed by all to be wholesome, for example, most foods; (2) those known by all to be injurious to some while perhaps beneficial or pleasurable to others, for example, alcoholic beverages; (3) those heretofore thought by all to be wholesome or tolerable, but which constantly expanding scientific research, thought and knowledge have now proved, or at least convinced many, to be injurious, such as cigarettes in the smoke of which appear polycyclic aromatic hydrocarbons and minute quantities of arsenic, and eggs, milk and butter with their high cholesterol content—and what the future may develop the most vivid imagination cannot foretell. Applying that doctrine, as we have stated it, to (1), no absolute liability is imposed upon the seller unless the product contains some foreign substance, is spoiled, or differs in some way from the product it is represented to be. As to (2), the same exceptions obtain; otherwise, the buyer knows as much about the article as the seller, and relies upon his own judgment rather than

that of the seller. As to (3), that doctrine leaves as a question of fact to be determined by the jury under appropriate instructions whether the seller, in the estimation of the parties, had a superior opportunity to gain knowledge of the product or its source, and, hence, whether the buyer, at the time of purchase, relied on the judgment of the seller. It is that doctrine, thus founded upon reason and on the presumed intention of the parties, which, we think, is clearly to be deduced from all of the Florida cases.

Under the present statute, 28 U.S.C.A. §1821, the district court had no authority to tax costs for compensation to an expert witness in excess of the statutory attendance per day, mileage and subsistence allowance.[1] The cost judgment is therefore reversed for entry by the district court of a judgment in accordance with this opinion. The judgments for the defendants are affirmed. Costs of appeal are taxed against the appellants.

CAMERON, *Circuit Judge*, Dissenting:

The jury in this case found that Edwin Green, Sr., age 49, died of primary cancer of the lung, which was proximately contributed to by his smoking of Lucky Strike Cigarettes, produced for human consumption by appellee American Tobacco Company.[1] Having thus found, the jury rejected the appellants' claim for Green's death, because

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[1] *Henkel* v. *Chicago, St. P. M. & O. Ry. Co.*, 1932, 284 U. S. 444; *Department of Highways* v. *McWilliams Dredging Co.*, W. D. La., 1950, 10 F. R. D. 107, aff'd 5 Cir., 1951, 187 F. 2d 61; *Cheatham Electric S. D. Co.* v. *Transit Development Co.*, 2 Cir., 1919, 261 Fed. 792, 796; *Fytag* v. *Gendlechian*, Dist. Ct. D. C., 1957, 152 F. Supp. 226; *Commerce Oil Refining Corporation* v. *Miner*, Dist. Ct. R. I., 198 F. Supp. 895, 897-898. 6 Moore's Federal Practice, §54.77 (5), p. 1367.

[1] It is not contended that there was lack of privity between American and Green.

the trial court required that they must find that the injurious substance so established to have been in the cigarettes and its harmful effects would have been revealed to American "by the reasonable application of human skill and foresight." This limitation on the jury was in effect the equivalent of a charge that the exercise of reasonable care on the part of American would exonerate it from liability. I think the charge was clearly erroneous.

This appeal is predicated solely on the theory that American breached its implied warranty to Green. I do not think that one who warrants wholesomeness can escape liability by showing that it exercised reasonable care in its efforts to achieve it. Such an idea is, in my opinion, a refutation of the whole concept of warranty. Because I do not believe that the inclusion of this limitation upon American's duty under implied warranty was justified, I am unable to join in the majority opinion affirming the action of the court below.

This Court recently delineated the general nature of implied warranty:

> "For the purpose of this appeal, the defendants apparently concede that the evidence is sufficient to sustain the findings of the jury that the plaintiff ingested the crab shell at Arnaud's and that it caused his injury. In our view there was ample evidence before the jury to justify these findings. It is contended, however, that the court *erred in trying the case on the theory of implied warranty* and in holding that plaintiff was not required to prove that Arnaud's was guilty of negligence, either actually or by the application of the doctrine of res ipsa loquitur. [P. 885] . . . .

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[1] *Arnaud's Restaurant, Inc. et al.* v. *Cotter*, 1954, 212 F. 2d 883, certiorari denied, 348 U. S. 915.

"The primary question for determination is whether under the decisions and law of Louisiana the proprietor of a public eating place *who serves a food fabricated* by him and containing a foreign substance . . . *is under an absolute liability for damages* proximately resulting from the impurity, under the theory of *an implied warranty of fitness*. Our review of the authorities convinces us that such is the law of Louisiana. Consequently, the trial court correctly enforced and applied this principle in the trial of the present case.

"This rule of liability was first announced in Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906, 907, 40 L.R.A., N.S. 480, where the Supreme Court of Louisiana held that the seller of food at a public eating place is *conclusively presumed to know any unwholesome condition of the food and is answerable in damages to a purchaser who is made ill because of the unwholesomeness*. The basis of this holding was said to be that:

> ". . . every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, and that *lack of such knowledge is imputed to him as a fault*, which makes him liable to the purchasers of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of."

"While the Court was there [LeBlanc v. Louisiana Coca-Cola Bottling Co., 60 So. 2d 873] dealing with a manufacturer's liability for injuries caused by the consumption of deleterious ingredients contained in a bottled beverage, it carefully pointed out that under

Louisiana jurisprudence *a plaintiff in such a case is entitled to rely upon the manufacturer's implied warranty that its product is safe for human consumption.*" [Emphasis supplied.]

While we were dealing in Arnaud's case with the presence of a foreign object, that was not the determinant fact: we placed great reliance upon and quoted from the *Doyle* case from the Supreme Court of Louisiana, where the consumer had been made sick by eating food purchased from the seller with respect to which the seller made uncontradicted proof of the exercise of the highest degree of care in its preparation. Nevertheless, the Supreme Court of Louisiana held that the seller was "at fault if these articles proved to be vitiated and deleterious."

The law there applied was the law of Louisiana, while here we are sitting as a Florida court and applying Florida's law. The quoted language is of some importance for the reason that the Supreme Court of Florida, in a case which it described as presenting a question of first impression, referred to the *Doyle* case, supra, as one of the authorities it relied upon in fashioning the Florida rule governing the doctrine of implied warranty. In *Cliett* the Florida court stated:

"The sole question for determination on the pleading is *whether the proprietor of a public restaurant or dining room who serves a meal containing unwholesome food* to a paying guest for immediate consumption on the premises *is under an absolute liability for the damages proximately resulting from the impurities, on the theory of an implied warranty* of fitness[3]

[3] *Cliett* v. *Lauderdale Biltmore Corp.*, 1949, 39 So.2d 476, 477.

"Some courts have held that in the absence of statute a victualer serving food for immediate consumption on the premises may not be held liable for food deleterious to health, without proof that he was guilty of negligence; while others have determined that aside from any question of negligence such a purveyor of foods for a valuable consideration *is under an absolute liability for unwholesome food served by him, on the theory of an implied warranty of fitness.* . . .

"In our opinion the implied warranty theory of liability comports with the general trend of the better reasoned cases and is supported, on principle at least, by decisions from our own jurisdiction. . . .

"These cases establish the principle that as to items of *food or other products* in the original package which are offered for sale for human *consumption or use generally*, a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome and fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of *unwholesome or deleterious substances* therein which are unknown to the buyer, may hold either the manufacturer or the retailer liable in damages for injuries sustained by him, on the theory of an *implied warranty of wholesomeness or fitness* of such article or product for the purposes for which it was offered to the public." [Emphasis added.]

In *Sencer et al. v. Carl's Markets, Inc.*, 1950, 45 So. 2d 671, the Florida Supreme Court, en banc, was considering the claim against the dealer, not the manufacturer, of persons made sick by eating sardines from a can from which they were served to the consumers. It held that both the manufacturer and the dealer were liable if unwholesome food were offered to the consuming public, quoting from Vol. 1, Williston on Sales, Rev. Ed., page 635:

"'*The imposition of absolute liability* upon a dealer who sells canned goods of reputable manufacture has been denied in a few decisions on the ground that the seller cannot possibly discover that a particular can is defective, and that it is, therefore, unjust to subject him to liability. The same argument, however, may be made in regard to any implied warranty, not only of food *or other articles, where* the buyer must have been aware that the seller could *not discover a defect if it existed*. Accordingly, if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on another basis.

"'But the general principle of the common law is opposed to this, and certainly if a dealer is ever to be made liable for injuries caused by defective goods *where he has been guilty of no fault*, the reasons are stronger for holding him liable for selling defective food than in any other kind of sale. And by the weight of authority, presumably for these reasons, a dealer is liable for selling such food even though in sealed containers of a reputable brand.'"[4]

In *Miami Coca Cola Bottling Company, Inc.* v. *Todd*, 1958, 101 So. 2d 34, the Florida court recognized the rule of the above cases in this comment:

"The bottler recognizes that Florida law places bottlers of cold drinks under the same rule of absolute

[4] The majority opinion takes note of the fact that two Justices concurred specially and two Justices dissented. None of them, however, differed with the majority in holding that the duty of the manufacturer was absolute. Judges Terrell and Hobson merely emphasized that they were in favor of holding the retail grocer, because otherwise the consumer in many cases could not reach the manufacturer. The dissenting Justices were in favor of holding the manufacturer, but not the dealer, to the same absolute liability the majority had declared to be the rule in Florida.

liability of implied warranty as canners of food. Florida Coca-Cola Bottling Company v. Jordan, Fla. 1953, 62 So. 2d 910."

In extending the implied warranty rule to a seller of seed, the Supreme Court of Florida, en banc,[5] recognized the continuing validity and vitality of the foregoing rules in these words:

> "The general rule that an ultimate purchaser may not sue the wholesaler is not an absolute one and it seems to be losing force with the passage of time. For instance, this court has recognized the principle 'that *as to items of foods or other products* in the original package which are offered for sale for human consumption *or use generally*, a person who purchases such items in reliance upon the express or *implied condition or assurance that they are wholesome and fit* for the uses or purposes for which they are advertised or sold, and *who is injured as the result of unwholesome or deleterious substances therein* which are unknown to the buyer, may hold either the manufacturer or the retailer liable . . .'
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> "There is a conflict of opinion about the accountability of a manufacturer to a consumer on the theory of implied warranty in the absence of privity, but this court has become aligned with those courts holding that suit may be brought against the manufacturer notwithstanding want of privity . . .'" [Emphasis added.]

The question of whether the rule of implied warranty in products cases arose from contract or from tort was settled by the Supreme Court of Florida in *Carter* v. *Hector Supply Co.*, 1961, 128 So. 2d 390, 394: "Perhaps in its judicial

[5] *Hosking* v. *Jackson Grain Co.*, 1953, 63 So. 2d 514.

incipiency the rule of liability on implied warranty was grounded in some measure on the law covering deceit and therefore assumed the complexion of a tort action. However, it is now generally agreed that the implication of a warranty arises out of a contractual relationship . . . ." That case involved an effort by a purchaser to apply the implied warranty rule against a seller with whom he was not in privity the subject of the sale not being for human use. In rejecting the application of the implied warranty rule in such a case, the court (p. 392) used language indicating clearly that, in products for human use cases where privity always exists, the implied warranty of the seller is absolute:

> "Again we emphasize that in the case at bar Carter relied entirely on an alleged implied warranty in order to *impose absolute liability regardless of fault* on the retailer with relation to whom there was no privity. Finding as we do that the lack of privity between these parties precluded the implication of a warranty, the plaintiff would necessarily be relegated to an action in tort for negligence. Actually this, in effect, is where the ultimate judgment of the court of appeal placed him. In that event, in the type of situation immediately before us, it would be necessary for him to prove that the retailer *knew, or should have known*, of the defective condition of the commodity. To this extent the court of appeal ruled correctly in holding that proof of this element would support a finding of fault on the part of the retailer. This is in direct contrast with the rule that *such proof is wholly unnecessary in an implied warranty situation* . . ." [Emphasis added.][6]

[6] From these cases it is plain that Florida is in the vanguard of those states, as yet numerically in the minority, which are holding purveyors of food and other products for human consumption to an absolute liability under the doctrine of implied warranty. The cases on the subject are legion and are collected in annotations

A reading of these cases and authorities demonstrates to me clearly that Question 4 as framed was effective in presenting to the jury only the claim that Green's death resulted from American's negligence and that it ignored entirely the liberal Florida rule based upon implied warranty, which was covered by another count in the complaint. To establish their claim based upon negligence it was admittedly incumbent upon appellants to prove that American knew, or by the exercise of proper care—probably more than reasonable care—could have known, that the nicotine[7] and arsenic present in the smoke from Lucky Strikes were likely to do harm to the decedent. The count based on negligence was submitted to the jury, which found in favor of American and no appeal was taken from that portion of the verdict. But the duty of the appellants to prove that American could, by the reasonable application of human skill and foresight, anticipate that Lucky Strikes would endanger decedent's health was not, under Florida law, a part of an action based upon implied warranty.

Every warranty is a promise by him who makes it, a contract, a stipulation, an assurance that the subject of the warranty will be performed or that the warrantor will make good the loss arising from its breach. Under Florida's law, the implied warranty was an unconditional guarantee to Green that the use to which the cigarettes would be put,

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found in 74 A. L. R. 2d, p. 241 et seq.; 75 A. L. R. 2d 39, et seq. and 44, et seq., and 77 A. L. R. 2d, pp. 61, et seq., 66, et seq., and 122, et seq. And see "Implied Warranty in Florida," 12 U. of Fla. Law Review, 241, 245-246; Prosser, "The Assault upon the Citadel (Strict Liability to the Consumer)," 69 Yale Law Journal 1099; and Frumer and Friedman, "Products Liability" (1960), pp. 1-8.

[7] Defined in Webster's New World Dictionary, College Edition, p. 991, as ". . . a poisonous alkaloid . . . found in tobacco leaves, from which it is extracted as a colorless, oily, acrid, transparent liquid . . .";

as understood by all, would not do him harm by reason of any deleterious substance or ingredient contained in them.

I think the Florida cases establish a rule of law which constitutes a condition of every sale of a product for human consumption or use, which has the same legal effect in this case as if appellee had entered into a written contract with decedent, covering every package of cigarettes purchased by him, couched in these words:

> American guarantees that the cigarettes contained in this package are fit to be used by purchaser, a human being, by lighting and drawing smoke from them into the lungs, so that the ingredients of the cigarettes carried in the smoke may be deposited on the walls of the blood vessels situated therein, to the end that said ingredients will be absorbed into the blood stream and will produce in the smoker the soothing and relaxing sensations normally attending such use; that said cigarettes do not contain any harmful or deleterious substance; and that it will indemnify the user against any injury, loss or damage which may result from the smoking of said cigarettes.

II.

As I understand the majority opinion, the effort is made to distinguish the Florida cases from the one before us chiefly on the ground that the decided cases deal with situations where some foreign object or substance was at the root of the injury caused the user. I understand further that the majority thinks that the fact that the Florida Court has, in several of the cases, adverted to the ease with which a manufacturer could determine the presence *vel non* of deleterious substances, as compared with the opportunity given the purchaser to gain such knowledge, demonstrates that the Florida Court intended to make proof

of foreseeability of harm by the exercise of reasonable care a *sine qua non* of recovery under the implied warranty rule. I am not able to agree with the majority on either score, and I think the italicized passages quoted from the Florida decisions, supra, demonstrate the error into which, in my opinion, the majority has fallen. A brief resume of the cases will be helpful.

In *Arnaud's* the presence of a piece of shell which should not have been in the dish served to the customer was mentioned, but what we stressed in that opinion was that the food *was in fact unwholesome when served.* It is clear from our opinion that the unwholesomeness alone fastened liability, the holding being that the seller was conclusively presumed to know of the existence of any unwholesome condition regardless of its cause, and that lack of knowledge is implied to him as a fault. This is plain from the language of the opinion, as well as the further holding that the implied warranty is that the product is *safe* for human consumption or use.

The Florida Court, in *Cliett*, held without equivocation that the seller is under an absolute liability if he serves unwholesome or impure foods regardless of their character or source. It emphasized too that the warranty applied to products for human use generally—not only food.

Singer was decided on the allegations of the complaint. A storekeeper had served a can of sardines which, when eaten, produced sickness. The complaint alleged, alternatively, that the sardines "contained foreign or dangerous matter deleterious within itself." The court did not reject the complaint on the ground that it did not allege that the sardines contained some foreign matter, specified or otherwise. It was enough that *whatever the can of sardines contained was deleterious within itself.* That was held sufficient by the Supreme Court of Florida. As to the matter of knowledge of what was in the can of sardines or ability to

acquire such knowledge, the storekeeper of course was wholly without any means of obtaining knowledge—yet absolute liability was fastened upon him.

In *Hoskins* neither knowledge nor the presence of a specified foreign substance was mentioned. The opinion holds simply and clearly that there is absolute liability where products in the original package are sold for human use or consumption and that injury results by reason of the presence of some unwholesome or deleterious substance.

The Florida Court in *Carter* emphasized again that, where products were sold for human consumption, proof that the seller knew or ought to have known of the unwholesome condition was "wholly unnecessary."

I am unable to read into the Florida decisions the ideas which the majority advances as the basis for its failure to follow what seem to me to be the clear and unequivocal holdings of the cases discussed. It is true that the court adverts, more than once in these cases, to the plain fact that the manufacturer or seller was in much better position to acquire knowledge of the nature and characteristics of the ingredients of the thing sold than the purchaser for use. These discussions, it seems to me, were in justification of its determination to apply the stringent implied warranty doctrine to this limited field of sales contracts instead of imposing on the purchaser the difficult task of proving negligence. There is, as I see it, no indication that the court was intending to water down the absolute obligations of a contract of implied warranty to the level of proof governing tort actions.

It is significant also that American does not rely on a single Florida case to support its position. It is content to rely on the contention that, granted that Green died because he smoked Luck Strike cigarettes, the maker of them should not be held liable for his death unless the jury could find from the evidence that it could, in the exer-

cise of reasonable care, have known that the deleterious substances in Luck Strike cigarettes would do him harm. Little good will be done by discussing the cases from other states which do not follow the rule embraced by the Florida Court with respect to implied warranty as governing such sales. Since American prints, as an appendix to one of its briefs, the entire opinion of the Court of Appeals for the Third Circuit in *Otto E. Pritchard* v. *Liggett & Myers Tobacco Co.*, 1961, now reported in 295 F. 2d 292, I will comment on the holdings of that case which, it seems to me, contains more which is favorable to the Greens than to American.

In his action for damages based upon the claim that he had contracted lung cancer from smoking Chesterfield cigarettes between 1921 and the time his lung was removed in 1953, Pritchard based his claim of liability upon implied warranty of merchantability and negligence. The District Court for the Western District of Pennsylvania dismissed the action founded upon breach of warranty, and granted the Tobacco Company's motion for directed verdict as to plaintiff's charges of negligence. The Court of Appeals for the Third Circuit reversed both rulings. Since Pritchard's action was predicated upon Pennsylvania's Uniform Sales Act, which establishes quite different bases of liability, including the element of knowledge, from the common law of Florida as recognized by its court decisions, very little can be gained by discussion of this phase of the decision. It is sufficient to observe that the Court thought that the evidence adduced to the trial court was sufficient to support a case based upon Pennsylvania's restricted rule of implied warranty or upon negligence, and indicating even that it was sufficient to sustain a claim based upon express warranty.

III.

In *Pritchard* the plaintiff offered evidence, held inadmissible for insufficient proof, of the existence of 795 articles allegedly dealing with the harmful effect of tobacco upon the human body. Certainly such evidence, coupled with that in the record before us and information possessed by everyone,[4] make it certain that we are dealing with a situation of recognized seriousness.

IV.

An illuminating dissertation on "Implied Warranty in Florida" appears in the University of Florida Law Review, Fall 1959, Vol. XII, No. 3, pp. 241, et seq.[5] A quotation from two of its paragraphs will be found interesting:

> "The subject of products liability is probably the most rapidly expanding area of substantive law at the present time. There are at least three reasons for this: . . . Moreover, goods are frequently packaged in sealed containers, and often the purchaser does not have the ability, the opportunity, or the desire to make an inspection of the articles purchased. Third,

[4] In the issue of Newsweek Magazine of March 19, 1962 is an article headed "On the Line Again," which describes a report just made by the Royal College of Physicians in London bearing the title "Smoking and Health." It is stated that the Society issued an unequivocal indictment of cigarettes. The statistics included in the report are anything but reassuring in connection with tobacco and lung cancer, coronary heart disease, and gastric ulcers. And the public press of April 7, 1962 carries a U. P. I. release which states: "The Italian parliament has passed a bill outlawing advertising for cigarets and other tobacco products."

[5] While a good number of the cases discussed in this dissent and in the majority opinion are analyzed in the article, its main conclusions are inapplicable to the problem before us inasmuch as it states, "The survey, however, will be confined to the questions of defects in the articles sold . . ."

the masterful and realistic logic of Mr. Justice Cardozo in the famous MacPherson v. Buick Motor Co. case, (111 N. E. 1050) in the year 1916 has given to courts and counsel strong impetus, and in some cases perhaps the necessary courage to re-examine previous decisions on the subject [Page 241] . . .

"By way of summary, it will be seen that although the doctrine of MacPherson v. Buick Motor Co. has been responsible for a great and beneficial change in the law relating to products liability there is still a great deal of confusion in a majority of the states and glaring contrast among the comparatively few settled principles as they are applied in the various jurisdictions. Happily, Florida has gone to the forefront of the states that have resolved the questions involved in this area in a logical and just manner . . ." [Pages 247-248]

Before summarizing briefly the points of difference between the majority and myself, I quote a rule which the authors of the Law Journal article distilled from two of the Florida cases which the majority and I have adverted to (Pages 253-254):

"Five years after the Blanton case, Cliett v. Lauderdale Biltmore Corp. nailed down the liability in food cases.

"Rule XI. *A seller of food for value to immediate consumers is absolutely liable for injuries as a result of unwholesomeness of the food on the implied warranty of fitness for human consumption regardless of negligence, the basis being the reliance of the consumer on the seller's skill and judgment.*" [Emphasis in the original.]

I understand to be basic in the rule of implied warranty of fitness announced by the majority "whether or not the buyer, at the time of the purchase, relies on the skill and judgment of the seller." There is no dispute on this question here. Green, before his death, testified that he bought Lucky Strike cigarettes in sealed packages, from the grocery store just as he bought many items of food packaged by reputable manufacturers; that he had no notice that, and made no investigation to determine whether, harmful ingredients were present and that he had never had a cigarette subjected to chemical analysis and had never had an occasion to do so. He stopped using them when he was advised that he had contracted lung cancer.

The majority treats cigarettes in the original package as belonging in the category of foods as respects application of the doctrine of implied warrant.[10] But it segregates "products intended for human consumption" into "three different classes." In class one, it places most foods; in class two, it places alcoholic beverages; and class three includes cigarettes. The basis for this classification I have been wholly unable to find. Certainly, as I understand them, the Florida cases do not give any hint of such a classification.

Strangely enough, the majority holds that no absolute liability is imposed upon the seller of foods, "believed by all to be wholesome." Liability as to food, according to its thinking, exists only where the food contains some foreign substance, is spoiled, or differs in some way from the prod-

[10] There would seem to be no question as to this since the cases, beginning with the *Clett* case, referred to "*foods or other products*" and added the words "use generally" as an alternative for the words "human consumption." As is pointed out above, the "consumption" of a portion of the smoke coming from Lucky Strike cigarettes is as real as the "consumption" of a portion of any item of food introduced into the human system through the alimentary canal.

uct it is represented to be. If the majority is correct in this, the writings of the Florida courts have, in my opinion, been in vain and the law of implied contracts governing sales of food is the same that it was before Mr. Justice Cardozo wrote the *MacPherson* opinion and the Florida Supreme Court decided the *Cliett*[11] case.

Nor do I find any statement in any Florida case which justifies the discrimination which the majority opinion makes in favor of purveyors of such articles as cigarettes. Finally, as I read them, the Florida cases do not justify the charge quoted in the majority opinion excepting the manufacturer from the absolute liability imposed upon it if the jury should find that the reasonable application of human skill and foresight would not reveal the harmful ingredients which the jury had found the accused cigarettes contained.

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[11] Sight seems to have been lost of the actions of the court below which are brought before us for review. The appellants filed in writing requests that the court spell out for the jury the Florida law of implied contracts as established with respect to products for human consumption. These several instructions refused by the court below incorporated principles taken directly from decided cases. Illustrative of them is Instruction No. 22 reading as follows:

"Implied Warranty

"The Supreme Court of Florida has recognized that the principle that as to items of food or other products in the original package which are offered for sale for human consumption or use generally, a person who purchases such items in reliance upon the express or implied condition or assurance that they are wholesome or fit for the uses or purposes for which they are advertised or sold, and who is injured as the result of unwholesome or deleterious substances therein, which are unknown to the buyer, may hold either the manufacturer or the retailer liable."

Cited as support for this requested instruction were the *Hoskins* and *Cliett* cases, *supra*.

A long discussion was had between the lawyers and the court concerning the requested instructions. The court stated that an exception would be allowed with respect to each instruction which was marked refused and that it would not be necessary for the plaintiffs to take any further exception.

For these reasons I respectfully dissent.

A true copy

Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit.

By (Signature illegible)

New Orleans, Louisiana, May 3, 1962.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19003

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

versus

AMERICAN TOBACCO COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(June 20, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and BEIN, *Circuit Judges.*

PER CURIAM: So far as concerns this case, the following facts are established by the jury's answers to interrogatories under Rule 49 (b), Federal Rules of Civil Procedure: (1) The decedent Green had primary cancer in his left lung; (2) the cancer in his left lung was the cause or one of the causes of his death; (3) the smoking of Lucky

Strike cigarettes on the part of the decedent, Green, was a proximate cause of one of the proximate causes of the development of cancer in his left lung; (4) American Tobacco Company could not, on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of Lucky Strike cigarettes, such as the decedent, Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung.

Those interrogatories were propounded and answered upon the assumption of certain facts which appear without dispute, such as: (a) At all pertinent times American Tobacco Company has been and still is the manufacturer and distributor of Lucky Strike cigarettes; (b) by February 1, 1956, the primary cancer in the left lung of decedent Green had been definitely diagnosed. He died on February 25, 1958.

In this diversity action, Florida law governs the rights and liabilities of the parties. Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung? There is no Florida decision precisely in point and so clearly on all fours as to be dispositive of this question or proposition of law.

In view of the importance of the question, and in especial consideration of the fact that one of the Judges of this

Court dissented from this Court's disposition of that question on original hearing, and that the Judges of this Court, on petition for rehearing, remain of the same views as expressed in their opinions on original hearing, this Court has decided to grant the petition for rehearing to the extent necessary to certify such question or proposition of the laws of Florida to the Supreme Court of Florida, as provided for under Section 25.034 Florida Statutes 1959, F.S.A., as implemented by Rule 4.61 of the Florida Appellate Rules (*In re Florida Appellate Rules*, 127 So. 2d 444, March 1, 1961). See *Clay* v. *Sun Insurance Office*, 1960, 363 U. S. 207, 212; *Sun Insurance Office* v. *Clay*, 133 So. 2d 735.

The parties are requested to stipulate, if possible, the contents of the certificate as provided for in said rule. If they are unable so to stipulate, they should report to this Court their respective views on or before August 1, 1962.[1]

To such extent the petition for rehearing is GRANTED.

[1] Such report may be typed, and accompanied by brief which may be either typed or printed, at least four legible copies to be filed.

APPENDIX E

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1963

Case No. 31,960

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, Deceased, and MARY GREEN,

Appellants,

—vs.—

THE AMERICAN TOBACCO COMPANY,

Appellee.

(TWO APPEALS CONSOLIDATED)

Opinion filed June 5, 1963

On certification from the United States Court of Appeals for the Fifth Circuit

Neal Rutledge, Milledge, Rutledge & Milledge; Lawrence V. Hastings and Irma Feder, for Appellants

Hervey Yancey, Samuel A. Broadnax, Jr., Smathers & Thompson, Ralph D. Ray, Melvin D. Goodman and Janet C. Brown, for Appellee

DREW, *J.*

Pursuant to statutory certification procedure[1] the United States Court of Appeals for the Fifth Circuit has pre-

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[1] Sec. 25.031, F. S.; F. A. R. 4.61. *Sun Insurance Office, Ltd. v. Clay*, Fla. 1961, 133 So. 2d 735. See also 24 F. R. D. 490; 16 Miami L. Q. 425; 55 N. W. L. 422; 40 Texas L. R. 621.

sented to this Court a question concerning implied warranty liability for lack of merchantability or fitness under Florida law, arising in an action for wrongful death consolidated with a suit instituted by the decedent Green prior to his death from lung cancer in 1958. The trial of the cause resulted in a general verdict for defendant, and the jury also answered a number of special interrogatories hereinafter detailed. Upon appeal the Court of Appeals affirmed, one judge dissenting, but in recognition of the controlling effect of Florida law in a diversity action a petition for rehearing was granted "to the extent necessary to certify [the following] question or proposition of the laws of Florida" to this Court:

> "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?"

We note at the outset that all questions of causation and privity are foreclosed by the terms of the question certified, which expressly assumes, as found by the jury's response to interrogatories in the trial of the cause, that defendant's cigarettes caused plaintiff's fatal cancer. We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of

law unmerchantable[2] in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case. The inquiry before us is, instead, limited to the status of Florida law upon imposition of liability "as for breach of implied warranty" when the manufacturer or warrantor "could not, by the reasonable application of human skill and foresight, have known of the danger."[2a] By response to a specific interrogatory the jury in this case found that the defendant, by this standard, could not at the pertinent time have known of the danger involved. The general verdict for defendant was responsive to the trial court's instruction that "implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can afford knowledge."

Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question certified must therefore be answered in the affirmative. As already indicated, we do not feel that the inquiry in terms either requests a response on the ultimate issue of liability in this case or requires any comment on the disposition of issues between the court and jury under the law relating to scope and breach of the implied warranty that a product supplied for human consumption shall be reasonably fit and wholesome for that general purpose.

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[2] Cf. *Food Fair Stores of Florida* v. *Macurda*, Fla. 1957, 93 So. 2d 860, cited in Frumer and Friedman, *Products Liability*, Sec. 25, and see also Sec. 29.03[4] on the problem of individual reaction to ordinarily harmless substances, discussion of which we deem unwarranted here because of the lack of Florida precedent and the limited issue posed in this nonadversary proceeding.

[2a] While not involved in the question before us, we note that the defense of assumption of risk is not asserted or involved in these proceedings.

Our conclusion on the point presented rests not only upon a determination, acknowledged in the opinion of the Court of Appeals herein, that there is no direct and affirmative precedent in our law for the "human skill and foresight" limitation on warranty liability, but also upon what seem to us clear and definitive pronouncements in our case law negativing this limitation. One of the more recent and exhaustive opinions is that in Carter v. Hector Supply Co.[5] This Court in that case expressly overruled the holding of the court of appeal "that proof of actual or implied knowledge of a defect on the part of a [defendant] is essential to his liability on an implied warranty."[6] "Implied knowledge" refers clearly to the situation where a defendant could, with reasonable diligence or "application of human skill and foresight," have had knowledge. The decision in Carter on this point of law therefore effectively negates any idea that proof of lack of opportunity for knowledge of a harmful condition might prevent implied warranty liability.

No reasonable distinction can, in our opinion, be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill. Spencer v. Carl's Markets[7] imposed upon a dealer liability for sale of a can of sardines which he could not have known was dangerous without opening a sealed container and thereby destroying the product's salability. The opinion quotes with approval from text authorities[8] explaining the prevailing rule that the fact that a defect could not possibly have been known or discovered by a defendant does not prevent liability, because "the same

[5] Fla. 1961, 128 So. 2d 390.

[6] *Ibid.*, p. 392.

[7] Fla. 1950, 45 So. 2d 671.

[8] Williston on Sales, Rev. Ed., Vol. 1, p. 635.

argument . . . may be made in regard to any implied warranty, not only of food . . . where the buyer must have been aware that the seller could not discover a defect if it existed." This case illustrates, we think, that whatever may be the scope of an implied warranty in a given case, the basis of such liability is the undertaking or agreement, attributed by law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes. The assumption of responsibility, even implied assumption, is not, of course, necessarily co-equivalent with skill and knowledge. To the extent that our cases take note of a defendant's opportunity for knowledge, it is merely in recognition of a supplier's superior position, relative to the purchasing public, as a factor affecting policy considerations rather than determining the limits of implied warranty liability in a particular situation.

The Florida decisions recognize a distinction between the ordinary merchantability warranty involved in the instant case and a warranty of fitness for a particular purpose which "must and necessarily does depend upon whether or not the buyer relied upon his own judgment at the time of the purchase or relied on the skill or judgment of the seller." The opinions refer to the classical statement of

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Blanton v. *Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313, 316:

"The implied warranty theory of liability comports with the general trend of the best reasoned cases. The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof, then the law should supply the injured person an adequate and speedy remedy. It is our conclusion that the implied warranty remedy of enforcement will accomplish the desired end." See also *Chitt*

Berger v. *E. Berger*, 76 Fla. 503, 80 So. 296; *Smith* v. *Burdine's*, v. *Lauderdale Biltmore Corp.*, Fla. 1949, 39 So. 2d 476.

Inc., 144 Fla. 500, 198 So. 223, 229.

implied warranty law in Benjamin on Sales,[9] containing a full discussion of the derivation of these principles governing implied warranties in the common law. The decision in Lambert v. Sistrunk,[10] denying a merchant's liability for sale of a defective stepladder, is an application of one of the limiting principles discussed by Benjamin and incorporated in statutes on this subject. If the defect is discoverable by simple observation then the law will imply no warranty against its existence. The opinion in that case characterizes implied warranty liability as an exception to the doctrine of caveat emptor, and relates this liability to "the reliance by the buyer on the seller's judgment," but does not in terms or by implication limit such liability to the situation where a dealer or manufacturer could, by reasonable care or "application of human skill," have known of the danger. Whether or not reliance is justified, when the defect is one which a purchaser need not reasonably expect, would depend not on the actual state of human or industrial knowledge, which may be quite unknown to the purchasing public generally, but on what information the buyer may, under the circumstances, reasonably suppose the seller has.[11]

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[9] 5th ed., Ch. III, 595-651

[10] Fla. 1952, 58 So. 2d 434, containing the following general comment:

> "It has been said that the concept of implied warranty rests upon the foundation of business ethics and constitutes an exception to the maxim 'let the buyer beware,' itself encompassing the idea that there is no warranty implied with respect to the quality of the goods being sold. To come into play, the exception must therefore spring from some moral obligation on the part of the seller, or perhaps more accurately, on the breach of some such duty amounting to fraud or the taking advantage of the buyer by reason of some superior knowledge in the seller, or the reliance by the buyer on the seller's judgment."

[11] *Cf. Smith* v. *Burdine's, Inc.*, note 8 *supra*. For a statement of the converse question of what a seller may reasonably expect a

In sum, our case law affirmatively supports and indicates no departure from the rule that implied warranty liability is not limited by the foreseeability doctrine, the "reasonable application of human skill and foresight" test of tort liability:

> ". . . The warranty of merchantable quality does not rest, and from the beginning did not rest, upon any such basis. It is a matter of contract, of interpretation of the language used in the light of the fact that the seller is a dealer, and dealers deal in merchantable goods. The only 'reliance' which it involves is reliance upon the seller's undertaking, as it is reasonably understood by the buyer. The pleasant sound of 'fitness for the purpose' should not be allowed to divert attention from one warranty to the other, or to obscure the fact that goods are merchantable only if they are fit for ordinary use. . . ."[12]

The contention that the wholesomeness of a product should be determined on any standard other than its actual

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purchaser to know, especially with regard to substances natural to a product, see Frumer and Friedman, note 2 *supra*, Vol. 1, p. 671:

> "Probably the most thorough analysis and attack upon the 'foreign-natural' test is made in the recent decision in Berchia v. Cape Cod Corp. [163 N. W. 2d 64 (Wis. 1960)] The Wisconsin court, in that case, in a very extensive discussion, refused to hold that there was no breach of warranty or negligence as a matter of law where injury was caused by a chicken bone in a chicken sandwich. The court adopted the test of 'reasonable expectation,' stating:
>
> "'What is to be reasonably expected by the consumer is a jury question in most cases; at least, we cannot say as a matter of law that a patron of a restaurant must expect a bone in a chicken sandwich either because chicken bones are occasionally found there or are natural to chicken.
>
> "'This test as applied to an action for breach of the implied warranty is keyed to what is "reasonably fit."'"

[12] Prosser on Warranty, Vol. 27, pp. 117-168, Minn. Law Review.

safety for human consumption, when supplied for that purpose, is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases. To hold that prevailing industry standards supplant the ordinary standard of objective truth and proof, and should be conclusive on the issue of a product's reasonable fitness for human use or consumption, would be to shift to the purchaser the risk of whatever latent defectiveness may ultimately be proven by experience and advancement of human knowledge, a risk which we are convinced was from the inception of the implied warranty doctrine intended to be attached to the mercantile function. There exists, we think, no real alternative and no valid objection to this distribution of the burden, if the public health is to be protected in any practical sense from exploitation by those who, for a profit motive, undertake to supply the vast and ever increasing variety of products which the people by unprecedented powers of commercial persuasion are daily urged to use and consume.

Accordingly, the question propounded to us, and found by us to be within the contemplation of our Rules, is answered in the affirmative as hereinabove set forth.

The Clerk of this Court shall forthwith transmit to the certifying Court a true copy hereof, and shall return to said Court any original papers or documents which may have been transmitted here for our inspection.

It is so ordered.

ROBERTS, *C.J.*, TERRELL, O'CONNELL and HOBSON (Ret.), *JJ.*, concur.

THOMAS and CALDWELL, *JJ.*, dissent.

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IN THE

Supreme Court of the United States

October Term, 1963

No. _____

THE AMERICAN TOBACCO COMPANY,

Petitioner,

-v-

MARY GREEN,

Respondent.

THE AMERICAN TOBACCO COMPANY,

Petitioner,

-v-

EDWIN GREEN, JR., as Administrator of the Estate of Edwin Green, deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Citation to Opinions Below

The first opinion of the Court of Appeals, affirming the judgment of the District Court, Judge Cameron dis-

senting, is reported at 304 F.2d 70; the Court's order on re-hearing to certify the question of Florida law to the Supreme Court of Florida is reported at 304 F.2d 85; the answer of the Supreme Court of Florida to the certified question is reported at 154 So.2d 169; the opinion of the Court of Appeals reversing the District Court and ordering a partial new trial (Judge Cameron dissenting on the ground that liability of defendant was established) is reported at 325 F.2d 673. These opinions are in the Appendices of the Petition.

Questions Presented

The petitioner's statement of the question presented is factually incorrect. The parties' new trial granted is not on the total issue of liability but merely on whether the defendant's cigarettes were reasonably fit and wholesome to the general public.

Question Presented as Restated by Respondent

When, in an action for breach of implied warranty of the wholesomeness of cigarettes, the Court of Appeals conceives that a judgment for liability requires a specific finding of a jury that the cigarettes were not reasonably fit and wholesome to the public generally, is such issue sufficiently distinct and separate from the issues specifically found by a previous jury by interrogatories, i.e., that decedent contracted lung cancer and died as a result of smoking defendant's cigarettes, so that a fair trial may be held on the single remaining issue?

Statement of the Case

Edwin M. Green sued American Tobacco Company in December 1957, in the United States District Court for the Southern District of Florida for breach of implied warranty causing lung cancer as a result of smoking defendant's product, Lucky Strike cigarettes. After Mr. Green's death on February 25, 1958, the case was continued by his Administrator. Decedent's widow filed suit under the Florida wrongful death statute. Both actions were consolidated. All theories of liability originally alleged, including negligence, are now immaterial except for implied warranty. The trial court submitted to the jury the following interrogatories:

"(1) Did the decedent Green have primary cancer in his left lung? Yes."

"(2) Was the cancer in his left lung the cause or one of the causes of his death? Yes."

"(3) Was the smoking of Lucky Strike cigarettes on the part of the decedent Green a proximate cause or one of the proximate causes of the development of cancer in his left lung? Yes."

"(4) Could the defendant, on or prior to February 1, 1956, by the reasonable application of human skill and foresight, have known the users of Lucky Strike cigarettes, such as the decedent Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung? No."

The jury answered the first three interrogatories in

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Neal Rutledge
601 Flagler Federal Building
121 N. E. First Street
Miami, Florida 33132

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the affirmative and the fourth in the negative. The District Court's charge to the jury required the general verdict to be for the defendant unless the jury could answer the fourth interrogatory in the affirmative. The Court of Appeals, 5th Circuit, first thinking that the charge correctly stated the law of Florida, affirmed the judgment by a divided court,[1] but upon rehearing certified to the Supreme Court of Florida the following question:

> "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not, on or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the mainstream smoke from such cigarettes, of contracting cancer of the lung?" Answer: Yes

The Supreme Court of Florida answered the question in the affirmative:

> "Upon the critical point, our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty, and the question

[1] The late Judge Cameron dissenting.

certified must therefore be answered in the affirmative." 154 So.2d 169.

This answer of the Florida Supreme Court required a reversal, but the question still remained as to the scope of a new trial. The plaintiffs argued that in view of Florida law the answers to interrogatories 1, 2 and 3 left no issue of fact on liability to be decided.[2] The defendant argued for a complete new trial. The Court of Appeals[3] accepted neither argument and decided that although there was proof that the incidence of lung cancer among cigarette smokers was twenty times higher than among non-smokers, in the absence of a specific finding by a jury that the defendant's cigarettes were not reasonably fit and proper for human consumption as to the public generally, the case should be retried by a second jury to determine that question. The Court held that it was possible that the same cigarettes which caused Green to die from lung cancer might also be found "*reasonably* fit and wholesome" for human consumption, and the two findings be consistent

[2] This contention was made in the District Court by plaintiffs' post trial motion for judgment under Rule 49(b) [R. 1149-1158]; and was asserted on appeal as plaintiffs-appellants' first question (see first opinion of Court of Appeals, 304 F.2d at 72). As petitioner concedes (footnote, p. 14 of Petition), Rule 49(b) does provide that where the jury's answers are consistent with each other, but inconsistent with the general verdict, judgment may be entered in accordance with the answers, but may not be entered in accordance with the general verdict. In such circumstances the specific answers of the jury are deemed a more accurate determination than the general verdict. These are precisely the circumstances plaintiffs submit are present in this case under the Florida Supreme Court's advisory opinion — i.e., the jury's answers are consistent with each other, but are inconsistent with the general verdict. See plaintiffs' cross petition for certiorari in this case.

[3] Judge Cameron dissenting on the basis of his consistent position that plaintiffs had established liability by the jury's special answers to the jury interrogatories.

with each other. Obviously the only way this is conceivable would be for the jury to find the cigarettes reasonably fit and wholesome for the public generally, albeit unwholesome and lethal for Green.

Reasons Why Writ Should Be Denied

While petitioners conceive that the issue ordered to be tried by the Court of Appeals is not required by the law of Florida and that they have already established liability, the question on this petition concerns the power of a court of appeals to grant a partial new trial.

Constitutionality of a Partial New Trial

That a partial new trial does not offend the Seventh Amendment was put at rest in **Gasoline Products Co., Inc. v. Champlin Refining Co.** (1931), 283 U.S. 494:

> "It [the Seventh Amendment] does not prohibit the introduction of new methods for ascertaining what facts are in issue, see Ex parte Peterson, 253 U.S. 300, 309, 64 L. Ed. 919, 923, 40 S. Ct. 543, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury." Id. at 498.

Since the adoption of the Federal Rules of Civil Procedure, the contention that a partial new trial offends the Seventh Amendment was rejected in **Thompson v. Camp**, 6th Cir., 167 F.2d 733. The argument that the Seventh

Amendment requires one jury to decide all issues at one trial is an argument that the forms of the common law jury trials rather than its substance is guaranteed. This contention was examined and expressly rejected by this Court in stating its holding in the **Gasoline Products Co.** case:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." 283 U.S. at 499.

Even the more substantive proposition that the Seventh Amendment prohibits a directed verdict was rejected in **Galloway v. United States** (1943), 319 U.S. 372, although with strong dissent. And in **Norfolk S. R. Co. v. Ferebee** (1915), 238 U.S. 269, this Court in a Federal Employers Liability Act case unanimously approved the application of some but not all of a jury's special findings to a partial new trial on the ground that the issues in the partial new trial were separable from those held to have been conclusively determined in the first trial — a ruling comparable in all respects to what petitioner calls the "unprecedented" ruling in this case.

Procedural Irregularity

Partial new trials are specifically provided for in Rule 59(a), Federal Rules of Civil Procedure:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in

an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * * "

The propriety, as well as the constitutionality of a partial new trial was passed on in **Gasoline Products Co. v. Champlin Refining Co., supra.** Whether a partial new trial should be granted depends upon whether the issue to be retried is "so distinct and separable from the others that a trial of it alone may be had without injustice." Id. at 500. By that standard "the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed." Id. at 499. But since the question of damages on the counterclaim was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." Id. at 500, a new trial on all issues raised by the counterclaim was ordered.[4]

Applying the same standard to cases decided since the adoption of the Federal Rules of Civil Procedure, see **Ecker v. Potts**, D.C. Cir., 112 F.2d 581; and **Devine v. Patteson**, 6th Cir., 242 F.2d 828, cert. den., 355 U.S. 821.

In the case last cited, the district judge was reversed for failing to grant a *limited* new trial, the Court of Appeals saying:

[4] The issues there held interwoven concerned the counterclaim only, and these were interwoven only because uncertainties as to dates and terms of the *oral* contract counter-claimed upon made separation of issues virtually impossible — a situation not comparable to the instant case.

> "A majority of the court thinks it would be unjust to the plaintiff who has proved to the satisfaction of the jury that he was subjected to malicious persecution to have to retry the question, not only of damages, but also of liability. If the issues are as we think, separate and distinct, conceivably plaintiff might be compelled to pay a second very large amount for legal expenses in order to collect the amounts expended in the first suit." 242 F.2d at 832-833.

Barron and Holtzoff, in their **Federal Practice and Procedure**, § 1307, commenting on Rule 59 say:

> "If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue."

The question whether the issue ordered for a new trial is so distinct and separate from those already tried and decided that it may in fairness be so tried, is one which must be left largely within the discretion of the lower federal courts so ordering because of their familiarity with those issues. This Court certainly can not undertake to review each case and record to decide when a partial new trial is appropriate and on which issues. But even the most cursory examination of the issues in this case shows that no issue could be more distinct than the one here under consideration.

What has already been decided by jury findings is

that Green died of lung cancer proximately caused by smoking defendant's cigarettes. This concerns the conduct of Green and the consequences to Green. That the defendant's cigarettes were unfit and unwholesome as to Green, since they killed him, has already been established. The Court of Appeals holds that this is not enough,—that Green's representatives must also prove that the defendant's cigarettes are dangerous to the public generally. This is the same question covered by the recent report of the Advisory Committee to the Surgeon General of the Public Health Service.* To have a fair trial on this issue does not require that it be proved again that, (1) Green had primary cancer in his left lung; or (2) that Green died from the cancer in his left lung; or that (3) the cancer in Green's left lung was proximately caused by the smoking of Lucky Strike cigarettes. The issue of whether other people—not Green—were endangered by use of defendant's product of contracting lung cancer, vel non, is certainly a separate and distinct issue from Green's risk, already proven after a long and expensive trial.

Petitioner cites **Magenau v. Aetna Freight Lines, Inc.** (1959), 360 U.S. 273. This case repudiates petitioner's contentions. There was no intimation that a partial new trial offended either the Seventh Amendment or Rule 59, notwithstanding that all questions of liability were determined by a jury on interrogatories. A complete new trial was there directed solely because "a limited hearing would not be in the interest of fairness and efficiency in judicial administration." Id. at 279.

Neither does **Hiltz v. Atlantic Refining Co.**, 3rd Cir., 151 F.2d 159, support the petition. It was explicitly as-

Smoking and Health, Public Health Publication No. 1103.

sumed that a partial new trial was proper procedure if the issues were distinct, which they were not in that case.

The reference by petitioner to the allegations of the complaint is a pure irrelevancy. All theories of liability other than implied warranty have been excluded from this case since the appeal began. The Florida law as to whether knowledge of the defendant is relevant to implied warranty was settled by the question certified to the Florida Supreme Court and its answer.

Argument that a jury's answers to interrogatories are not res judicata is beside the point. This case will not be res judicata until it is finally decided, a state of affairs which the respondents have not yet despaired of. The trial of the case has not yet been completed. It is just possible that this may be accomplished before Green's widow dies of old age if plaintiffs are allowed the privilege of completing the trial begun over six years ago without further delay or error induced by the American Tobacco Company.

Were the question now for consideration the abolition of Rule 49 as a matter of judicial administration, we candidly say we would speak for the affirmative, for it is respondents' counsel's view that generally it denigrates the jury function and provides a useful tool for the economically powerful litigants to win legal battles by attrition.

[1] Petitioner sought an extension of time for filing the instant petition due in part to the fact that two of petitioner's counsel have passed away since this litigation began in 1957, both deaths occurring prior to the recent demise of Judge Cameron who sat in this case. In only 2 or 3 more years decedent's 9-year-old daughter will be leaving home for college or a job.

[2] In this case the jury was required to answer each jury interrogatory in the affirmative before proceeding to the next. (R. 1139). Four

On such a question we would not expect to be allied with counsel for the American Tobacco Company. In this particular case, however, Rule 49 has operated to save a widow and her son, as administrator for his father's estate, an enormous expense in retrial. Such operation of the Rule to conserve judicial effort and to reduce the tremendous (if not prohibitive) cost of litigation, should not be discouraged. Actually, plaintiffs believe that they have proved already to a jury everything which Florida law ever required them to prove to be entitled to a judgment of liability. But at least they have proven everything except that the defendant's cigarettes are not reasonably fit and wholesome vis-a-vis the general public. Neither Justice nor the Seventh Amendment requires a complete new trial at a price only wealthy litigants can afford in order merely to determine this single remaining issue.

affirmative "hurdles" had to be leaped in succession to reach a verdict of liability — while one negative answer, at any point, resulted under the Court's charge in a general verdict of no liability. The pragmatic burden of proof under such circumstances is heavier indeed than a mere "preponderance".

Conclusion

The issue ordered to be tried before a second jury—that cigarettes are not reasonably fit and wholesome for human consumption by the general public—is quite distinct and separate from the issues heretofore tried and decided by jury findings, and therefore a fair trial of it alone may be held. The petition of the American Tobacco Company for a writ of certiorari should be denied.

Respectfully submitted,

Neal Rutledge
601 Flagler Federal Building
111 N. E. First Street
Miami, Florida 33132

Lawrence V. Hastings
312 Biscayne Building
Miami, Florida 33132
Counsel for Respondents

Stanley Milledge,
Irma Feder
Of Counsel

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served by mail this 2 day of April, 1964, upon Edward R. Neaher, Janet C. Brown and Edward C. McLean, Jr., all of Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, New York, Counsel for Petitioner, and upon Hervey Yancey, of Smathers & Thompson, Alfred I. duPont Building, Miami, Florida, counsel for Petitioner, by depositing the same in the United States mail addressed to said counsel as aforesaid with sufficient air mail postage, prepaid.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 961

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

MARY GREEN,

Respondent.

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, deceased,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD R. NEAHER
25 Broadway
New York 4, New York
Counsel for Petitioner

JANET C. BROWN
EDWARD C. McLEAN, JR.

CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 Broadway
New York 4, New York
Of Counsel

Dated: May 13, 1964

In the

Supreme Court of the United States

October Term, 1963

No. 961

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

MARY GREEN,

Respondent.

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, deceased,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Plaintiffs' Misstatement of the Issue to Be Retried

Respondents* in opposing the petition in No. 961 misread the opinion of the Court of Appeals below with respect to the issue to be decided on the new trial.

First, although defendant believes that the new trial was improperly narrowed in scope, it was not so limited as plaintiffs now insist. The question to be retried is not

* Respondents were plaintiffs below and petitioner the defendant and will hereinafter be referred to as such.

simply that of "reasonable fitness" (Pl. Br., p. 2) but of defendant's liability for breach of implied warranty.*

The judgments entered on the jury's general verdicts previously deciding that issue for defendant have been reversed (Pet. App., p. 12a). The general verdicts, themselves, are now vacated (*id.*, p. 9a). Thus the ultimate issue of defendant's liability remains unresolved until decided by the new jury on retrial.

Defendant's position is, of course, that all of the factual questions entering into the determination of this issue should be passed upon by the new jury and that liability cannot be properly retried by foreclosing from re-litigation the factual matters included in the interrogatories answered by the first jury.

Second, the Court of Appeals did not define the "reasonable fitness" question to be retried in terms of the product's fitness "to the general public", as plaintiffs would have this Court believe (Pl. Br., pp. 2, 5, 10, 12). Nor did it hold that defendant's cigarettes were "unfit and unwholesome" as to Mr. Green in light of the jury's answer to interrogatory 3, as plaintiffs also imply (*id.*, pp. 6, 10).** The Court of Appeals simply determined that the scope of defendant's implied warranty was limited to an undertaking that the product was "reasonably fit and wholesome" (Pet. App. A, p. 5a). And it concluded, after receiving the Florida Supreme Court's advisory opinion, that despite the general verdicts for defendant, the jury had not made a sufficient finding as to whether or not that undertaking had been satisfied (*id.*, pp. 7a-8a).

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* References to "Pl. Br." are to the respondents' brief in opposition to the petition in No. 961. References to "Pet." are to the petition in No. 961.

** Neither did the Supreme Court of Florida so hold (Pet. App. E, pp. 57a-58a). See defendant's brief in opposition to plaintiff's cross petition for certiorari in this case (No. 997).

One question specifically designated for retrial, therefore, was whether defendant's product was "reasonably fit". But neither the Court of Appeals nor the Supreme Court of Florida indicated that a jury could answer this question properly without regard to all the facts and circumstances, although by barring re-litigation of the matters included in the first jury's answers to the interrogatories, the Court of Appeals effectively prevented the second jury from determining for itself what those facts and circumstances were.

In short, as we have previously pointed out (Pet., p. 19), the factual matters included in the first jury's answers to the interrogatories are related both to the unresolved ultimate issue of liability and to the unresolved factual questions, including the "reasonable fitness" question. In these circumstances, the preservation of the answers to bind the second jury is indeed unprecedented.

Certainly nothing in *Norfolk S. R. Co.* v. *Forehee*, 238 U. S. 269 (1915), which plaintiffs cite (Pl. Br., p. 7), is to the contrary. There a partial new trial on damages alone was granted and special verdicts found by the first jury were preserved, this Court finding that the question of damages was "in fact separable" (*id.* at 273). But unlike the case at bar no general verdict for defendant was involved and the liability issue was resolved at the first trial. Moreover, this Court was careful to point out that the practice of granting partial new trials "is not to be commended" (*id.* at 274).

No Mere "Procedural Irregularity" Is Involved

Nor is the ruling below an example of mere procedural irregularity (Pl. Br., p. 7). Defendant of course recognizes that partial new trials when properly granted do not offend

the Seventh Amendment (Pl. Br., pp. 6-7). But where, as here, the dual prerequisites to the granting of a partial new trial, as set forth in the *Gasoline Products* case, are not satisfied (Pet., pp. 17-18), the ordering of a partial new trial is not an offense to "propriety" alone (Pl. Br., p. 8). For, we submit, the requirements of the Seventh Amendment can never be satisfied by an order "which would amount to a denial of a fair trial." *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494, 500 (1931).*

Finally, any implication that this case has taken over six years because of "delay or error induced by the American Tobacco Company" (Pl. Br., p. 11) is wholly unjustified. Plaintiffs, not defendant, began this action in the Federal court, thereby requiring state law to be determined by that court. As the court below stated in granting plaintiffs' application to go before the Florida Supreme Court, there was "no Florida decision precisely in point and so clearly on all fours as to be dispositive of this question or proposition of law" (Pet. App., p. 54a). The question the court there referred to was the very knowledge question plaintiffs introduced into this case by their complaint and told the jury it had to decide (R. 4, 35-6). The present proceedings have unfortunately been made necessary to some extent because of plaintiffs' insistence in the court below that it would be "unusually onerous" (Pet. App., p. 9a) to re-

* If by citing Rule 59(a) of the Federal Rules of Civil Procedure (Pl. Br., pp. 7-9), plaintiffs are suggesting some relationship to Rule 49(b) involved here, then we point out that Rule 59(a) merely incorporates the rule of the *Gasoline Products* case, *supra*. See the Advisory Committee's Notes to the Rules of Civil Procedure for the District Courts of the United States (1938), p. 56. Nor do the cases cited by plaintiffs (Pl. Br., pp. 8-9) add anything to the discussion, because they are merely examples of permissible partial new trials on separable issues—clearly not the situation here.

quire them to "re-litigate" the issue of defendant's liability—a jury finding indispensable to recovery and one they have thus far failed to obtain.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari in No. 961 to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted.

EDWARD R. NEAHER
25 Broadway
New York 4, New York
Counsel for Petitioner

JANET C. BROWN
EDWARD C. McLEAN, JR.
CHADBOURNE, PARKE, WHITESIDE & WOLFF
25 Broadway
New York 4, New York
Of Counsel

Dated: May 13, 1964

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief in Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari was served by mail this 13th day of May, 1964 upon Neal P. Rutledge, 111 N.E. 1st Street, Miami, Florida, and upon Lawrence V. Hastings, 312 Biscayne Building, Miami, Florida, counsel of record for respondents herein, by depositing the same in a United States mail box at 25 Broadway, New York 4, N. Y., in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

EDWARD R. NEAHER
Counsel for Petitioner

Dated: May 13, 1964